

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

THETA IP, LLC * January 4, 2022
*
VS. * CIVIL ACTION NO. W-20-CV-160
*
SAMSUNG ELECTRONICS ET AL *

BEFORE THE HONORABLE ALAN D ALBRIGHT
FINAL PRETRIAL CONFERENCE

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08:21 1 (January 4, 2022, 8:35 a.m.)

08:35 2 THE BAILIFF: All rise.

08:35 3 (Call to Order of the Court.)

08:35 4 DEPUTY CLERK: Final Pretrial Conference in Civil Action
08:35 5 W-20-CV-160, styled Theta IP, LLC versus Samsung Electronics
08:36 6 Company, Limited and Samsung Electronics America, Incorporated.

08:36 7 THE COURT: Good morning, everyone. If I could have
08:36 8 announcements from counsel, please.

08:36 9 MS. DE MORY: Good morning, Your Honor. Denise De Mory on
08:36 10 behalf of plaintiff Theta IP, LLC. With me are Aaron Hand,
08:36 11 Henry Bunsow.

08:36 12 MR. BUNSOW: Good morning, Your Honor.

08:36 13 THE COURT: Good morning.

08:36 14 MS. DE MORY: Russ Horton, Mike Flynn-O'Brien, Corey
08:36 15 Johanningmeier and Hillary Bunsow as well.

08:36 16 THE COURT: Welcome, all.

08:36 17 And for Samsung? Mr. Cordell?

08:36 18 MR. CORDELL: Good morning, Your Honor. Ruffin Cordell.

08:36 19 THE COURT: I think this is your first time in my
08:36 20 courtroom.

08:36 21 MR. CORDELL: It is, indeed, and it's beautiful. You
08:36 22 know, I don't know what took me so long.

08:36 23 THE COURT: Well, welcome here.

08:36 24 MR. CORDELL: Well, good. So I'm here on behalf of
08:36 25 Samsung this morning with Martin Black, Michael Song, Melissa

08:37 1 Smith, Michael McKeon, Dan Tishman.

08:37 2 We also have a -- one of our lawyers tested positive for
08:37 3 COVID and is sequestered in his hotel room. He feels fine, but
08:37 4 out of an abundance of caution, we're leaving him back.

08:37 5 THE COURT: Well, I had -- Christmas eve morning I tested
08:37 6 positive for COVID. So I spent my Christmas quarantined by
08:37 7 myself which was not the greatest Christmas ever. So I'm very
08:37 8 sympathetic to your partner.

08:37 9 MR. CORDELL: If the Grinch had only thought of that, that
08:37 10 would have been a better thing. Frank Albert might, with the
08:37 11 Court's permission, might appear for a couple of the arguments
08:37 12 remotely.

08:37 13 THE COURT: Absolutely fine.

08:37 14 MR. CORDELL: And then we have our client representative
08:37 15 here, Mr. Anthony Kahng, is with us from Samsung.

08:37 16 THE COURT: Welcome.

08:37 17 Are we ready to proceed?

08:37 18 MR. CORDELL: Yes, Your Honor.

08:37 19 MS. DE MORY: We are, Your Honor.

08:37 20 THE COURT: I think the first issue is -- let me just get
08:37 21 my cheat sheet. So the first issues have to do with claim
08:38 22 construction. And I'm happy -- there's a motion to adjourn
08:38 23 which I guess is moot or -- since we're taking this up today,
08:38 24 correct?

08:38 25 MR. CORDELL: We don't believe it's moot, but we are

08:38 1 taking it up today, hopefully.

08:38 2 THE COURT: Well, then I think it's going to be denied.

08:38 3 But let's go ahead and take up the motions.

08:38 4 MS. DE MORY: Your Honor, Mr. Johanningmeier will be
08:38 5 handling this.

08:38 6 THE COURT: Okay.

08:38 7 MR. CORDELL: And I believe it's our motion, Your Honor.

08:38 8 THE COURT: Yeah. I think they get to go first.

08:38 9 Good morning.

08:38 10 MR. BLACK: Good morning, Your Honor.

08:39 11 (Off-the-record discussion.)

08:39 12 MR. BLACK: There we go. Thank you, Your Honor.

08:39 13 So this is our motion. We started this off with a motion
08:39 14 for summary judgment of indefiniteness or noninfringement for
08:39 15 failure of their expert to use plain meaning.

08:39 16 The standard for indefiniteness, of course, is that a
08:39 17 claim must have reasonable certainty to it. And the issue in
08:39 18 this case is whether or not the claim is drafted, the high and
08:39 19 low relative terms of degree are sufficiently definite to allow
08:39 20 us to proceed and whether their expert used a plain and
08:39 21 ordinary meaning construction, which is what they asked for
08:39 22 during claim construction and Your Honor granted.

08:39 23 Now, the important point here is that it is not enough to
08:39 24 draw part of the boundary around a claim. It is not enough for
08:39 25 someone to be able to look at these claims and identify one

08:39 1 high condition where the device is at the highest possible
08:40 2 power level. You've got to be able to draw all the boundaries
08:40 3 around the fence, around the claim for it to be definite.

08:40 4 So if you have a situation like this where you've got
08:40 5 multiple possible ways to complete the fence, you do not have a
08:40 6 definite claim. That's the law.

08:40 7 The Supreme Court said in *Nautilus* in 2014, they tightened
08:40 8 up the standard, which means all the cases that came before
08:40 9 that and were cited in Theta's brief are largely irrelevant. A
08:40 10 patent claim has to be sufficient to inform those of skill in
08:40 11 the art about the scope of the invention with reasonable
08:40 12 certainty.

08:40 13 The Federal Circuit has said you must have objective
08:40 14 boundaries, and the Western District of Texas has said it
08:40 15 cannot fall inside the scope of the claim term but also it
08:40 16 falls outside of it. Both have to be known, got to have the
08:40 17 full scope of the claim.

08:40 18 The fact that the parties can do part of the work in this
08:40 19 case on infringement, part of the work on validity is
08:41 20 insufficient if the claim is not drawn completely.

08:41 21 So what are the claims that we have in this case? We've
08:41 22 got a method for power dissipation reduction in a receiver that
08:41 23 causes improvement in a drain on battery life. That's Claim 1
08:41 24 of the '962.

08:41 25 This is the basic functionality here, and this again is

08:41 1 from Claim 1 of the '962: Wherein the wireless transceiver
08:41 2 comprises a circuit for determining two things, a signal
08:41 3 strength of the interferer signal and a signal strength of the
08:41 4 desired signal.

08:41 5 So what we have on the left is you have the signal coming
08:41 6 in. You've got the desired in sort of green and the interferer
08:41 7 in red. They're mixed together. They go into the circuit.
08:41 8 There are sensors inside the phone that determine the signal
08:41 9 strength. And those spit out values, two numerical values, a
08:41 10 signal strength for the interferer and a signal strength for
08:41 11 desired signal.

08:41 12 Now, the question is: What do you do with those two
08:42 13 values?

08:42 14 Now, what the patent says is, you then have to determine
08:42 15 whether or not those values are high values or low values, and
08:42 16 there must be an algorithm for doing that. The device must
08:42 17 have a way to determine which are high and which are low. And
08:42 18 the experts applying infringement analyses in this case must be
08:42 19 able to state what that algorithm is, show that it's described
08:42 20 in the patent and that it creates reasonable certainty.

08:42 21 And those things are simply not present here. You have
08:42 22 two numbers that are spit out by the circuit. Are they high,
08:42 23 or are they low? That's the question.

08:42 24 Now, the patent teaches pretty straightforwardly with a
08:42 25 series of diagrams and text that the signal strength is graphed

08:42 1 on the Y-axis of this diagram here. Frequency on the right, on
08:42 2 the X-axis going to the right and signal strength going up.
08:42 3 These are values. The patent teaches at Column 5, Line 33 that
08:43 4 in each of these figures the signal strength is plotted along
08:43 5 the Y-axis 204 or 254 as a function of frequency along the
08:43 6 X-axis.

08:43 7 So, again, very straightforward, numerical values on the
08:43 8 Y-axis. If they're sufficiently high on the Y-axis, those are
08:43 9 high values. If they're near the bottom, near the origin,
08:43 10 those are low values. That's what the patent teaches. That's
08:43 11 plain meaning. You got numbers. Some are high and some are
08:43 12 low. That concept, easy enough.

08:43 13 The trouble is when you come to the point of trying to
08:43 14 determine which of those X and Y values are actually high or
08:43 15 low. There is no consensus, there is no standard for doing so,
08:43 16 there is nothing in the patent which teaches you which ones are
08:43 17 high and which ones are low.

08:43 18 Now, there's no debate that the highest and the lowest
08:43 19 satisfy the high and the low. But as soon as you come away
08:43 20 from the top, as soon as you start moving up from the bottom,
08:43 21 there's ambiguity in the claim.

08:44 22 Now, we pointed this out at claim construction and Theta
08:44 23 made a promise. They promised that they were going to bring
08:44 24 standards, that they were going to bring certainty during the
08:44 25 course of the case to this question. They referred to the LTE

08:44 1 standard. They referred to other standards and said that they
08:44 2 would bring that evidence to the Court in their expert reports,
08:44 3 and they didn't do that.

08:44 4 Now, during the briefing -- and this is Theta's Markman
08:44 5 brief, they agreed, and this is the law when a word of degree
08:44 6 is used -- and high and low are words of degree -- the Court
08:44 7 must determine whether the patent provides some standard for
08:44 8 measuring it. That was the debate at Markman. It wasn't about
08:44 9 whether engineers understand high or low. It wasn't about
08:44 10 whether someone in a course might write up on a board, well, if
08:44 11 it's high, do this, if it's low, do that.

08:44 12 The question is, what is the objective standard? What is
08:44 13 the algorithm that an expert can use to determine which of
08:44 14 those values, X and Y values, are high and which are low.
08:45 15 There must be an objective standard.

08:45 16 Now, they told you at Markman that they were going to
08:45 17 provide that information to us and to the Court. These are
08:45 18 quotes from their Markman briefing. They said, "A POSITA would
08:45 19 readily understand that reference to the relevant specification
08:45 20 or standard would be expected." They said, "Wireless standards
08:45 21 and specifications typically set forth required minimum
08:45 22 operating conditions in the context of the standards and/or
08:45 23 requirements documents applicable to a particular embodiment."

08:45 24 They said that a POSITA would interpret the claims with
08:45 25 reference to applicable wireless standards and specifications.

08:45 1 What they told the Court is, they were going to bring in
08:45 2 standards like the LTE standard which would inform the Court
08:45 3 and provide the reasonable certainty about which values were
08:45 4 high and which values were low.

08:45 5 Now, we said at the time that that was the wrong way to
08:45 6 approach it because the standard that's published after the
08:45 7 patent is filed does not become part of the specification and
08:45 8 cannot be used to inform reasonable certainty, but you ruled
08:46 9 against us. We accept that.

08:46 10 However, they broke their promise. They did not bring in
08:46 11 their expert reports the standards or anything objective from
08:46 12 which you could tell which of those X and Y values are high and
08:46 13 which are low.

08:46 14 Instead, when their experts arrived for their
08:46 15 deposition -- and I want to point out, there's no section on
08:46 16 claim construction in their report. We waited for their expert
08:46 17 report because in their initial infringement contentions, the
08:46 18 amended contentions, the amended contentions, which changed
08:46 19 their case entirely, they took no position on how one is to
08:46 20 determine whether X and Y are high or low.

08:46 21 We waited for the expert report. We opened the report.
08:46 22 444 pages failed to identify any standard for determining high
08:46 23 and low. They did that intentionally.

08:46 24 Now, the first step in an infringement analysis, we always
08:46 25 say -- and it's the law and you'll give an instruction on that

08:47 1 to the jury -- is, you must first construe the claims, then you
08:47 2 apply the accused product against the language.

08:47 3 But here we didn't get a construction from them. They
08:47 4 just said plain meaning, and that's it. They didn't tell us
08:47 5 how you calculate X and Y and how you determine whether they're
08:47 6 high or low.

08:47 7 So we finally had an opportunity to get the answer from
08:47 8 their expert, Dr. Larson, when we took his deposition. And he
08:47 9 said a couple of really interesting things. He said: There's
08:47 10 no unambiguous boundary between high and low, and, therefore,
08:47 11 in my opinion, between high and low. Except that clearly, an
08:47 12 order of magnitude, that's high. And equal is not high.

08:47 13 Well, let's break that apart.

08:47 14 No unambiguous boundary. The boundary is required to make
08:47 15 a claim definite. It's not enough that you can point to an
08:47 16 example that might be high. Those who are in the field, those
08:47 17 who are in the area have a right to know.

08:47 18 The public notice function of the patent requires that we
08:47 19 be able to determine with certainty every single limitation,
08:48 20 every single embodiment that is within the claim and without
08:48 21 the claim. That's the law. That's Nautilus. That's the
08:48 22 Supreme Court.

08:48 23 He struggled, and then he said, well, you know what, if
08:48 24 I'm pressed, how about an order of magnitude? Meaning that the
08:48 25 claims are -- for high and low would be sufficient if the high

08:48 1 is 10 dB, an order of magnitude above the low. That creates
08:48 2 absurd results. It's not in the patent and it is definitely
08:48 3 not plain meaning, which was your construction.

08:48 4 So if that is the construction that he applied, and that's
08:48 5 the only evidence we have, he did not apply the Court's
08:48 6 construction and they therefore cannot present that
08:48 7 infringement opinion. Does not comply with the Court's
08:48 8 construction.

08:48 9 He also said that there's a transition from high to low to
08:48 10 equal, where the transition is unclear. And then he said
08:48 11 people could genuinely honestly disagree about that. That is
08:48 12 the definition of indefiniteness. An expert can't come in and
08:49 13 say I don't know what the scope of the claim is and then apply
08:49 14 that claim and ask for [REDACTED]. That is not the way the
08:49 15 process works.

08:49 16 This was not an accident. This was a plan on the part of
08:49 17 Theta. Dr. Larson repeated it again later in his deposition.
08:49 18 He says, "As I've said, you know, this order of magnitude
08:49 19 thing, it's approximate." Order of magnitude.

08:49 20 You didn't hear about that in the most recent briefing at
08:49 21 all. They've come up with new constructions. But he applied
08:49 22 the order of magnitude construction.

08:49 23 When we got to their invalidity expert, he used the same
08:49 24 construction. This was a setup. They come to the depositions
08:49 25 and they provide a construction that wasn't given to us and

08:49 1 wasn't plain meaning. And he says, "I would say that a low
08:49 2 signal would be 10 dB or less smaller than the interferer in
08:49 3 this case. But, you know, that's an arbitrary number." An
08:49 4 arbitrary number.

08:49 5 Eventually we're going to go to Washington and the Federal
08:49 6 Circuit's going to hear an appeal in this case. Arbitrary
08:50 7 number. These claims are indefinite, and they are indefinite
08:50 8 because Theta is struggling to come up with an infringement
08:50 9 case that makes sense. They can't build one.

08:50 10 But more fundamentally, they got a plain meaning
08:50 11 construction. We all accepted that as the law of the case.
08:50 12 They didn't use plain meaning when they prepared their expert
08:50 13 reports. This is the wrong construction and it's not plain
08:50 14 meaning, and it means they have no infringement case to put on.

08:50 15 Look at what that construction would do to the case. You
08:50 16 have a -20 dBm signal is high and then a -30 dBm signal is low
08:50 17 because it's 10 dBm apart, one order of magnitude. You've got
08:50 18 two signal strengths in the middle with -60 and -70. Those are
08:50 19 medium. They're neither high nor low.

08:50 20 And then you've got a low signal of -110 dBm. You got a
08:50 21 high signal of -100. The receiver can barely interpret that.

08:50 22 That's the construction they picked. That's the
08:51 23 construction that they built their expert report around and
08:51 24 they built the case around, and that's the construction they
08:51 25 want to go to the jury with. But it is not a valid

08:51 1 construction. It is not supported by the specification,
08:51 2 extrinsic evidence. And more importantly, it's not what they
08:51 3 asked for and not what your Court granted which was a plain
08:51 4 meaning construction.

08:51 5 This case, as a result of all this, is a mess. You've got
08:51 6 a situation where you had a plain meaning construction and they
08:51 7 took advantage of that. They built ambiguity into their expert
08:51 8 reports. We've nailed them down to a construction at the
08:51 9 depositions, and now we're somewhere else.

08:51 10 Now, we argued this two weeks ago, and Your Honor asked
08:51 11 for a very straightforward and reasonable thing: A short brief
08:51 12 from Theta on how its expert applied plain meaning and what its
08:52 13 infringement theory was.

08:52 14 We got a 25-page brief in response which started with a
08:52 15 jury argument about why their inventor's such a great guy, how
08:52 16 he's been pictured on IEEE Magazine, Columbia professor,
08:52 17 eminent professor. All that's true. He's an impressive guy.
08:52 18 But it has nothing to do with whether the claims in this case
08:52 19 are definite and what they actually got out of the Patent
08:52 20 Office.

08:52 21 What they did not address is the order of magnitude
08:52 22 construction that their expert used. They then proposed on
08:52 23 Pages 6 to 7 of their brief, two days before -- three days
08:52 24 before Christmas, a set of new constructions which make no
08:52 25 sense whatsoever.

08:52 1 When we pointed that out -- and Your Honor had ordered new
08:52 2 claim construction. You ordered them to tell them what claim
08:52 3 construction to actually apply, which they didn't do. When we
08:52 4 pointed out that their constructions were not only wrong but
08:52 5 inconsistent with what their expert had done and there was no
08:52 6 support for, they then, on Sunday of this week, removed the
08:53 7 noise floor and the S_{MAX} , rewrote the constructions again.

08:53 8 Now, we can't keep up with this dizzying array of
08:53 9 construction after construction after construction. We've had
08:53 10 at least four constructions in this case, though, from Theta.

08:53 11 First, what they promised at Markman, we'll show you the
08:53 12 standards that'll resolve any ambiguity. Didn't happen.

08:53 13 Second, compare the desired and the interferer signal to
08:53 14 each other, where the higher one is roughly 10 dB order of
08:53 15 magnitude stronger. Well, they've abandoned that too. That
08:53 16 was the one they used in their expert reports.

08:53 17 Now, on December 22nd, they say compare the signals to
08:53 18 each other and to the noise floor and the S_{MAX} in some weird
08:53 19 undefined way. We got a brief a couple days later and they
08:53 20 retracted that.

08:53 21 And now, on January 2nd, a few days before trial, two days
08:53 22 ago, on Sunday, they tell us that we should just compare the
08:53 23 signals to each other to see if they're near each other,
08:53 24 creating ambiguity upon ambiguity upon ambiguity.

08:54 25 What does this show?

08:54 1 This shows that Theta does not know what their claims
08:54 2 mean. This shows that these claims are indefinite. This is,
08:54 3 in fact, the strongest evidence of indefiniteness in the case,
08:54 4 that even the plaintiff cannot decide what its own claims mean
08:54 5 from day to day.

08:54 6 The latest set of constructions, meaningless, indefinite.
08:54 7 We haven't had an opportunity to respond to them. Their brief
08:54 8 is chock-full of extrinsic evidence, which we haven't had an
08:54 9 opportunity to examine.

08:54 10 It's not in comport with the intrinsic evidence. It's not
08:54 11 in comport with the specification or the file history here,
08:54 12 which did not grant Dr. Tsividis what he would've liked to
08:54 13 have, the patent on dynamic signal changing. He did not get
08:54 14 that. He had something much narrower.

08:54 15 So here's what they say now -- and I point out and it's
08:54 16 highly prejudicial that we have to do this Tuesday, two days
08:55 17 after getting the constructions, when this is a
08:55 18 case-dispositive issue.

08:55 19 What they say for the low-low, for instance, case is that
08:55 20 the signal -- desired signal is low, combined with the signal
08:55 21 strength of the interferer signal that is near the desired
08:55 22 signal.

08:55 23 So we first have to determine whether desired signal is
08:55 24 low. That's a question begging if there ever was one. The
08:55 25 "signal strength of the desired signal low" is the claim term,

08:55 1 and their definition is "a signal strength of the desired
08:55 2 signal that is low."

08:55 3 What kind of construction is that? That's
08:55 4 nonconstruction. That's going backwards.

08:55 5 And then for the interferer, now they've got a new
08:55 6 construction. It's just "near the desired signal strength."

08:55 7 There's no objective standard. There's no reasonable
08:55 8 certainty here. We're going backwards, not forwards.

08:55 9 What does "near" mean? We have no idea. Does it mean an
08:55 10 order of magnitude, 10 dB? I don't know. How can we tell from
08:56 11 this? And how can you enter these constructions when, most
08:56 12 importantly, these are not the constructions that were used by
08:56 13 their expert during the expert phase of this case? That's the
08:56 14 critical point, Your Honor.

08:56 15 They did not answer your question about what constructions
08:56 16 their expert actually used. Instead, they proposed new
08:56 17 constructions twice in the last two weeks. But the one thing
08:56 18 that we know must be true is that because these words are
08:56 19 different, because these are new constructions, these are not
08:56 20 the constructions that their expert used.

08:56 21 And what that means is they would like to go to trial and
08:56 22 put on an infringement case based on expert opinion that is not
08:56 23 based on a construction that their expert used or provided to
08:56 24 us. That cannot possibly be done, that cannot possibly be
08:56 25 fair.

08:56 1 And that's our principal reason, Your Honor, for asking
08:56 2 for either indefiniteness here or that a finding of no plain
08:56 3 meaning was used, and that the case should be dismissed on
08:57 4 summary judgment.

08:57 5 If we're going to have some sort of claim construction
08:57 6 procedure, we've got to have it fairly, we've got to have an
08:57 7 opportunity to respond to it and we've got to have an
08:57 8 opportunity to put the case back into position for trial. It
08:57 9 cannot be tried next week on these constructions.

08:57 10 Thank you.

08:57 11 THE COURT: I'll hear a response.

08:57 12 MR. JOHANNINGMEIER: Your Honor, we have paper copies of
08:57 13 our slides. Would you like some for you and the clerks?

08:57 14 THE COURT: I can see it on the screen here. I don't
08:57 15 need --

08:57 16 MR. JOHANNINGMEIER: Okay. All right.

08:57 17 Well, good morning, Your Honor. So I'm going to start
08:57 18 here with what Your Honor asked us to do, which is a
08:58 19 supplemental brief on claim construction.

08:58 20 So if we can have the next slide.

08:58 21 Okay. So a year ago there was a Markman hearing. I
08:58 22 wasn't here, actually, because my daughter was born a few
08:58 23 months before. So I didn't get a chance to argue at that
08:58 24 hearing. Mr. Hand did an excellent job.

08:58 25 And at that hearing, at the end of the hearing, Mr. Black

08:58 1 argued about the middle boundary between high and low. And
08:58 2 Your Honor decided that the claims were definite and that plain
08:58 3 meaning would apply. So that was the law of the case. That's
08:59 4 what we had and that's what we did.

08:59 5 The claim terms do have a plain meaning to a person of
08:59 6 ordinary skill. Professor Larson applied that meaning. His
08:59 7 understanding is consistent with everyone else on our side of
08:59 8 the case, and it's consistent with their expert when he's
08:59 9 talking about invalidity.

08:59 10 And the Court has already decided that these terms are
08:59 11 definite. But we're here on a rehearing of that and multiple
08:59 12 briefs from them about indefiniteness. They haven't engaged on
08:59 13 the construction issue.

08:59 14 But let's just talk about the plain meaning, because
08:59 15 that's what we understood Your Honor to be asking about in the
08:59 16 last hearing.

08:59 17 So in the next slide, a person of ordinary skill would
08:59 18 understand the claims. Now, this is Dr. Kiaei, Samsung's
08:59 19 expert. He did both infringement and invalidity. And he cited
08:59 20 a textbook in his background of his invalidity section, and
08:59 21 that textbook's from 1998, so before these patents. And in
09:00 22 there we find a description of the very situation that's in
09:00 23 Dr. Tsividis' patents. Just the -- you know -- and it's
09:00 24 exactly the same way.

09:00 25 So the point here is that Dr. Tsividis, Professor

09:00 1 Tsividis, teaches this material in the way that's shown on the
09:00 2 right in the patent. He shows the signals, the signal levels,
09:00 3 relative to the noise $4N$, relative to the signal maximum.

09:00 4 Dr. Razavi, in this other textbook, teaches it the same
09:00 5 way, high interferes -- "a weak signal accompanied by two
09:00 6 strong interferers" that then you would experience third-order
09:00 7 non-linearity, could corrupt the desired component.

09:00 8 So the point here is that this is how the stuff is taught
09:00 9 in the industry. This is how it is explained.

09:00 10 On the next slide, another reference that's in Dr. Kiaei's
09:00 11 report showing the same way, talking about it in the same way,
09:00 12 strong desired signals, weak desired signals and interferers, a
09:01 13 diagram that looks very familiar.

09:01 14 Again, this is how things are talked about and shown in
09:01 15 this industry by persons of ordinary skill. This is how
09:01 16 they're taught in the textbooks and in the papers that they
09:01 17 read.

09:01 18

09:01 19

09:01 20

09:01 21 That figure would look familiar; but if it doesn't, there
09:01 22 it is on the right from the patent.

09:01 23 And on the bottom, here's a paper he published in 2003 in
09:01 24 an IEEE publication talking about the desired signal being
09:01 25 strong and no strong blocker being present, talking about a low

09:01 1 noise floor.

09:01 2 This is how people talk about this stuff in the industry.
09:01 3 This is how a person of ordinary skill understands this kind of
09:01 4 material. They understand what high signals mean in their
09:01 5 particular application. They understand what low signals mean
09:02 6 in their particular application, depending on what standard
09:02 7 they're using. Whether it's LTE, whether it's 802.11 WiFi,
09:02 8 this patent applies to all of those.

09:02 9 Each of those has different standards. Each of those
09:02 10 standards has different signal maximums that are specified. So
09:02 11 if you know you're doing LTE, you know there's a rough sense
09:02 12 that gives you the low number, you know what's high, and you
09:02 13 can figure all of this out. That's what we've been saying all
09:02 14 along.

09:02 15 On the next slide, you know, this is just a reminder from
09:02 16 the tutorial. This is how we were talking about it back then.
09:02 17 There's a lot of talk in their briefs about us changing our
09:02 18 position. We have not done that. This has been the consistent
09:02 19 position all along.

09:02 20 You start from a condition where you have a signal maximum
09:02 21 and a noise floor, and this is what's described on the right.
09:02 22 On the left here is what's described in the patents as the
09:02 23 worst case -- or a worst case, the worst case with the high
09:03 24 interferers and the low signal strength.

09:03 25 It teaches that when you're in that situation, you can

09:03 1 adjust the bias and lower the signal maximum. When you lower
09:03 2 the signal maximum, you've changed the operating point of the
09:03 3 circuit. So now it has a new high and a new low. It has a
09:03 4 different dynamic range. So then from that point forward,
09:03 5 you're now operating with a different low and a different high.

09:03 6 We use the example in our brief of someone climbing a
09:03 7 mountain. You know, they can start from the bottom and they're
09:03 8 going to get all the way to the top, but part way up they're
09:03 9 going to set an anchor, and then they're going to climb some
09:03 10 more from there.

09:03 11 The worst case for them is when they are way above their
09:03 12 anchor point, then they set a new anchor and now they have a
09:03 13 new floor and they're going to climb up towards the new
09:03 14 ceiling.

09:03 15 It's the same -- this is basically how you understand the
09:03 16 chart that Mr. Black showed. He showed the entire range and
09:04 17 suggested that low could only be down at the bottom, high could
09:04 18 only be at the top.

09:04 19 Within that range, there's an operating range that has a
09:04 20 floor and a ceiling. That's what defines what's high and low,
09:04 21 and it changes over time in the course of operating as
09:04 22 described in the patents.

09:04 23 On the next slide is the same thing. The impedance
09:04 24 changing, which raises the floor. It's showing a new range.
09:04 25 In the right here, it shows the power dissipation, but that's

09:04 1 the dynamic range of the circuit.

09:04 2 So this is how the patent teaches this stuff to a person
09:04 3 of ordinary skill, and that's how they understand it.

09:04 4 And it is objective. Objective doesn't have to mean
09:04 5 numbers are applied. Objective means you can figure it out. A
09:04 6 person of ordinary skill can figure it out.

09:04 7 On the next slide, it's taught the same way in the patent.
09:05 8 He talks about a worst-case input signal where you've got the
09:05 9 low -- this will be 2B on the right -- the low desired signal,
09:05 10 the high interferers, and talks about the circuit impedances
09:05 11 and currents that are being set such that the noise floor is
09:05 12 sufficiently low for acceptable bit-error rate. So if you get
09:05 13 too low, you get errors and it doesn't work. That's how you
09:05 14 know you're too low.

09:05 15 And then you set it for -- the bias currents are set
09:05 16 sufficiently high for a required signal maximum. So you have
09:05 17 to have your maximum above the strongest signal you're going to
09:05 18 receive so that you don't get clipping and interference.

09:05 19 This is all taught in the patent. Person of ordinary
09:05 20 skill understands this. They know that their circuit has a
09:05 21 floor and it has a ceiling, and they know that that ceiling and
09:05 22 floor move when they change the parameters.

09:05 23 Okay. Next slide.

09:05 24 Just more diagrams showing the same thing. Reducing
09:05 25 the -- sorry. Yeah. You can go on to Slide 11.

09:06 1 So there is, you know, many, many teachings in the patent
09:06 2 of how this works. [REDACTED]

09:06 3 [REDACTED]
09:06 4 [REDACTED] It's consistent with
09:06 5 textbooks and references that their own invalidity expert
09:06 6 relied on.

09:06 7 So -- and here it's showing that the worst-case signal
09:06 8 condition with reference to the figures is where the desired
09:06 9 signal is lower than the interferers. That's the worst case
09:06 10 because the interferers when you -- if you have a low desired
09:06 11 signal and you're attempting to amplify it in order to be able
09:06 12 to receive it, you're also amplifying the interferers. So this
09:06 13 causes problems. It requires a very wide, dynamic range. It's
09:06 14 hard to do in the circuit. So he's teaching that to a person
09:06 15 of ordinary skill.

09:06 16 Now, on the next slide, here's where we applied this.
09:07 17 Dr. Larson in his report applied this to the actual devices,
09:07 18 the actual chips and the phones, you know. The -- here he's
09:07 19 using the datasheet for one of the transceivers in the phone.

09:07 20 MR. BLACK: Your Honor, I'm sorry to interrupt. This is
09:07 21 highly confidential material, which some people in the
09:07 22 courtroom may not be entitled to see. I just want to make sure
09:07 23 we don't have anyone.

09:07 24 THE COURT: You know what? You can -- I understand
09:07 25 your -- the point you're making. You can take it off the

09:07 1 screen.

09:07 2 MR. JOHANNINGMEIER: Okay.

09:07 3 THE COURT: And Mr. Black?

09:07 4 MR. JOHANNINGMEIER: That's a good reason. I'll give you
09:07 5 the paper copies.

09:07 6 THE COURT: Mr. Black, are you okay with him discussing
09:07 7 this in -- on the open record if he doesn't use that?

09:07 8 MR. BLACK: Yes, Your Honor. As long as we have an
09:07 9 opportunity later to redact anything of the public record, I
09:07 10 think that should be fine for this.

09:07 11 MR. JOHANNINGMEIER: Okay.

09:08 12 THE COURT: If you'll just get me to the page that you're
09:08 13 on.

09:08 14 MR. JOHANNINGMEIER: Yes. So Page 12, and I'll try to
09:08 15 remember to call out the page numbers.

09:08 16 THE COURT: Is it 13? It looks like 13.

09:08 17 MR. JOHANNINGMEIER: Well, there's two. So the -- Page
09:08 18 12. [REDACTED]

09:08 19 [REDACTED]

09:08 20 [REDACTED]

09:08 21 [REDACTED] It's discussed in the textbook
09:08 22 that we mentioned. It's in our brief, you can see the
09:08 23 discussion in the Razavi textbook that their expert relies on.

09:08 24 [REDACTED]

09:08 25 [REDACTED]

09:09 1 [REDACTED]

09:09 2 [REDACTED]

09:09 3 [REDACTED]

09:09 4 [REDACTED]

09:09 5 [REDACTED]

09:09 6 So Dr. Larson says in his report this here, at least,

09:09 7 meets the worst-case conditions. You've got a low desired

09:09 8 signal. You've got a jammer signal that's 1,000 times larger

09:09 9 than that. And so that would be a worst-case condition.

09:09 10 [REDACTED]

09:09 11 [REDACTED]

09:09 12 [REDACTED]

09:10 13 [REDACTED]

09:10 14 [REDACTED]

09:10 15 [REDACTED]

09:10 16 [REDACTED]

09:10 17 [REDACTED]

09:10 18 [REDACTED] So he makes that point to start in his analysis.

09:10 19 The next thing he does relative to these particular terms

09:10 20 is on Page 14 there are gain -- there are diagrams showing the

09:10 21 various gain states and showing the map of the signal

09:10 22 conditions. [REDACTED]

09:10 23 [REDACTED]

09:10 24 [REDACTED]

09:10 25 [REDACTED]

09:10 1 [REDACTED]

09:11 2 [REDACTED]

09:11 3 [REDACTED] And, you know, of

09:11 4 course, in his report he describes all of the code and the

09:11 5 documents behind this, why this is working this way.

09:11 6 And there's no disagreement from them with how this works.

09:11 7 So there's not -- we're not going to have a dispute about how

09:11 8 the actual products are working here, right?

09:11 9 And then on the right it shows the noise figures, which

09:11 10 add up to basically the total noise floor, changing. It shows

09:11 11 the signal-to-noise ratio changing. So the signal-to-noise

09:11 12 ratio is the signal to the noise floor that's changing along

09:11 13 with the gain state.

09:11 14 So this is showing basically in action with real numbers,

09:11 15 for this particular transceiver how the thing is stepping

09:11 16 through those different signal figures like we showed in the

09:12 17 patent, with the noise floor and the signal maximum changing as

09:12 18 the gain states change, which is done based on the input

09:12 19 signals.

09:12 20 [REDACTED]

09:12 21 [REDACTED]

09:12 22 [REDACTED]

09:12 23 [REDACTED]

09:12 24 [REDACTED] This is -- that aspect

09:12 25 of it is not disputed here.

09:12 1 So this is how he applied -- you know, obviously there's
09:12 2 more to his report about the other claim steps, but this is how
09:12 3 he applied the plain meaning as taught in the teachings of the
09:12 4 patent. You know, there's -- what does plain meaning mean? It
09:12 5 means: What would people understand when they read the patent?

09:12 6 That's the definition from Phillips, right, that plain
09:12 7 meaning is what a person of ordinary skill understands from
09:12 8 reading the patent. They would read this, they would
09:13 9 understand how it works, and then they would try to apply that
09:13 10 to these chips. They would look at the testing numbers and
09:13 11 they can -- you know, if you want objective numbers, here they
09:13 12 are.

09:13 13 But this is showing how this works. The algorithm is in
09:13 14 the code that he looked at. Counsel mentioned an algorithm. I
09:13 15 heard a few times that the code is performing this algorithm to
09:13 16 make these adjustments in this particular environment. I
09:13 17 believe this is LTE signals, but, you know, the -- because
09:13 18 that's one of the things that these devices cover.

09:13 19 So Your Honor asked us to show you this, so we put this in
09:13 20 our brief and here it is in the slides.

09:13 21 Your Honor also suggested that, you know, there may be a
09:13 22 need to do construction. And part of the goal of the
09:13 23 supplemental briefing was to do that now rather than during the
09:13 24 trial, which is a laudable goal, if it's necessary. So we
09:14 25 proposed constructions.

09:14 1 Now, we clarified, we don't think this requires
09:14 2 construction. What's actually happened in this case is we've
09:14 3 construed plain and ordinary meaning. [REDACTED]

09:14 4 [REDACTED]
09:14 5 [REDACTED]
09:14 6 [REDACTED]
09:14 7 [REDACTED]

09:14 8 And that's true, there are. In other gain states at the
09:14 9 very end of the range, you can have one that's only up at -12.
09:14 10 But within the subset of the range that you're operating in,
09:14 11 which is between the noise floor and the maximum, this is a
09:14 12 worst-case condition.

09:14 13 So he wants to go to the end points and say, you know, the
09:14 14 lowest possible signal and the highest possible signal; and if
09:14 15 you're less than the highest possible, that's not infringing.
09:14 16 He's got that in his report at Paragraph 309. That's just a
09:15 17 claim interpretation. That's a misapplication of plain and
09:15 18 ordinary meaning.

09:15 19 They don't want to look at that. They didn't address
09:15 20 that, when we brought it up in our brief, in their response.
09:15 21 Their expert is misapplying this stuff. That's the issue.

09:15 22 And then they're just doggedly saying indefinite,
09:15 23 indefinite, indefinite. They don't want to talk about what
09:15 24 their expert did on either invalidity, where he understood the
09:15 25 claims the same way, or on infringement, where he's basically

09:15 1 making claim reinterpretations.

09:15 2 So that's the situation we're in. We proposed
09:15 3 constructions because we wanted to offer something that would
09:15 4 be consistent with our -- what we've done in our report, if
09:15 5 Your Honor feels it's necessary to construe these claims in
09:15 6 order to give clarity to the jury; because that's ultimately
09:15 7 what we're trying to do here, is not confuse the jury about how
09:15 8 this works. That's the purpose of claim construction.

09:15 9 So we made a proposal and initially suggested that we
09:15 10 could put in the noise floor and the signal maximum. They
09:16 11 complained about that, said they didn't like it. So we pointed
09:16 12 out, you could do it without those as well.

09:16 13 Either of those proposals is consistent with what
09:16 14 Dr. Larson did. Of course, we wouldn't have proposed it if it
09:16 15 were otherwise, right? I mean, these are constructions that,
09:16 16 again, we're offering in order to clarify things for the jury.

09:16 17 Mr. Black suggested he didn't have any the opportunity to
09:16 18 respond. They've had plenty of briefing on this. They had a
09:16 19 responsive brief. They didn't choose to address it rather than
09:16 20 just continue to go back to where they were at the beginning on
09:16 21 Slide 16.

09:16 22 This is from last year. There's no standard here, Your
09:16 23 Honor, for low end of high or the high end of low. That's
09:16 24 where they were at the end of the Markman argument, and then
09:16 25 you told them that everyone agreed that a person of skill in

09:16 1 the art would understand what this means, doesn't need to be
09:16 2 construed, and it will have plain and ordinary meaning.

09:16 3 So that's what we did. That's what Dr. Larson did. He
09:17 4 applied that, found infringement, which they don't dispute the
09:17 5 facts of. They came back with some interpretive
09:17 6 noninfringement arguments that we don't think are appropriate.
09:17 7 And they also filed a -- you know, they spent most of discovery
09:17 8 quizzing all of our deponents on what would happen if you were
09:17 9 in the middle between high and low, right?

09:17 10 There's hours of testimony of various forms of questioning
09:17 11 about the middle boundary between high and low. And in some of
09:17 12 that testimony Dr. Larson, being a helpful person, said, well,
09:17 13 you know, if he was looking at that, maybe 10 dBm, an order of
09:17 14 magnitude would be sufficient to say, okay, there's enough of a
09:17 15 difference to matter here.

09:17 16 This isn't a construction that he applied in his report.
09:17 17 They say it's not in his report. Of course it's not in his
09:17 18 report. This is his response to being deposed on this middle
09:18 19 boundary. And he suggested that. But so did Dr. Smith, our
09:18 20 other expert. And even -- there's even some testimony from
09:18 21 Professor Tsividis about a 10 dB difference that we've got in
09:18 22 our briefs.

09:18 23 This is not a construction. This is not an order of -- he
09:18 24 called it an order of magnitude construction. That's not the
09:18 25 construction here. It was never applied that way. It is a

09:18 1 response to a deposition question about what would a person of
09:18 2 ordinary skill do in this middle boundary?

09:18 3 And Dr. Larson clearly said, well, they would look at at
09:18 4 least 10 dB. An order of magnitude would be a significant
09:18 5 thing, and that he's basing that on his experience in the
09:18 6 industry as a inventor and as a teacher. He's been teaching
09:18 7 this for many, many years. Not as many as Dr. Tsividis, but
09:18 8 he, you know, offered that as an example.

09:18 9 But it's not a construction. It's not what we're going
09:19 10 with. It's not a, you know, new thing that we tried to
09:19 11 surprise them with. It's a response to questioning on the
09:19 12 issue that Your Honor decided last year. And so you know,
09:19 13 that's the reason it's not in the reports. It is what a person
09:19 14 of ordinary skill would understand according to Dr. Larson and
09:19 15 Dr. Smith and Dr. Tsividis.

09:19 16 And, you know, these numbers that I showed here on Slide
09:19 17 12 meet that. They're three orders of magnitude apart. So it
09:19 18 meets its construction. It's consistent with his analysis to
09:19 19 say that that's a minimum point. But it isn't a construction
09:19 20 or a rule that we're applying. It is not the construction, it
09:19 21 is not necessarily even the plain meaning.

09:19 22 But, you know, if asked, how would you tell? Dr. Larson
09:19 23 would say, well, I would find at least 10 dB to be something
09:19 24 that was significant, that or more.

09:20 25 But as we pointed out in our briefs, there's no claim

09:20 1 element that goes to this middle boundary. There is no, you
09:20 2 know, medium-medium that -- you know, there are other claims in
09:20 3 other parts of the patent family that talk about medium. But
09:20 4 there is no -- these claims do not talk about medium signal
09:20 5 strength. They talk about unambiguously high, which Dr. Larson
09:20 6 said there are, you know, discernable and unambiguously low.
09:20 7 And when you get in that situation, they tell you what to do to
09:20 8 change your floor, to change your ceiling, to get into a new
09:20 9 operating point where you can save power.

09:20 10 And then once you're in that new operating point with that
09:20 11 new floor and that new ceiling, you can find a worst-case
09:20 12 condition again and do the same adjustment again. It's
09:20 13 dynamic, biasing. It's changing the operating conditions of
09:20 14 the circuit in order to save power over time. And that's
09:20 15 what's taught in the patents.

09:20 16 Now, I have a number of slides here about all of our
09:21 17 witnesses talking about the -- you know, consistently with
09:21 18 this. These slides were, I think, handed up in the last
09:21 19 hearing as well. And I'm happy to go through them if Your
09:21 20 Honor wants, but I think the point here is that the main thing
09:21 21 to take away from this is their own invalidity expert
09:21 22 understands this patent in the same way that we do and cites to
09:21 23 materials that talk about low and high and weak and strong
09:21 24 signals that show the same diagrams that Dr. Tsividis is using
09:21 25 to teach this stuff.

09:21 1 Their own expert gets it when he wants to do invalidity.
09:21 2 Their own expert doesn't apply any objective standard to find
09:21 3 numbers for high and low in his invalidity report. He just
09:21 4 applies the claims the same way here.

09:21 5 So there's no surprise for them. There's no -- you know,
09:21 6 they've understood this all along. They just want a ruling
09:22 7 that because there's not numbers in this patent, that it is
09:22 8 somehow indefinite. But that isn't the law.

09:22 9 I will put that up just briefly. Hold on one second.

09:22 10 The other thing about their expert report is that he
09:22 11 didn't talk about indefiniteness. He didn't, you know, suggest
09:22 12 that these claims were unresolvable, especially when he was
09:22 13 trying to find them invalid. But he doesn't say that. He
09:22 14 doesn't have an indefiniteness opinion. He says the claims are
09:22 15 invalid. He says they're not infringed because he interprets
09:22 16 high and low differently.

09:22 17 So in the Nautilus case, the standard is reasonable
09:23 18 certainty to a person of ordinary skill. And Nautilus cited
09:23 19 another older case called Eibel about the paper-printing
09:23 20 machines that had the term "high" in it. And the Supreme Court
09:23 21 said, well, people of skill in this art know these machines and
09:23 22 they would know what high is.

09:23 23 And that's the same -- here it is on this slide. Thank
09:23 24 you, Aaron.

09:23 25 Slide 34. All the way back in 1923, the Supreme Court

09:23 1 said this. Now, Nautilus didn't overturn this. Nautilus cited
09:23 2 this. So here's an example of the Supreme Court saying that
09:23 3 when the evidence discloses that a person of skill has no
09:23 4 difficulty in fixing the place that's high, then it's fine.

09:23 5 And of course there's also, on the following slides, a
09:23 6 bunch of district court cases.

09:23 7 Next one, then. 36, I guess.

09:23 8 Eibel. Input/Output in the Eastern District, "low
09:23 9 frequency forces."

09:24 10 Now, some of these results are because there was examples
09:24 11 in the spec, and some of these results are because a person of
09:24 12 ordinary skill would understand this.

09:24 13 There's multiple ways to meet the objective standard, not
09:24 14 just numbers, not just a formula. What we have in this patent
09:24 15 is a description of how to dynamically change things so that
09:24 16 they will save power over time. So the Freeny case is one in
09:24 17 the Eastern District. The Corning Optical case, low-frequency
09:24 18 control signals. Freeny was low-power communication signals.
09:24 19 I believe Your Honor might have been in that case, so you might
09:24 20 actually remember that one.

09:24 21 The low profile, you know, again, there's plenty of
09:24 22 examples. It's a case-by-case thing of course, so there's
09:24 23 examples going the other way. But if the -- I think the core
09:24 24 thing to look at here is what was done in the Eibel case and
09:25 25 how that wasn't changed by Nautilus. If a person of ordinary

09:25 1 skill can figure this out and apply it objectively, then it's
09:25 2 not indefinite.

09:25 3 So I won't -- I will save some time in case there's some
09:25 4 rebuttal. Or if Your Honor has any questions, I'm happy to...

09:25 5 THE COURT: Okay. I'll hear from Mr. Black.

09:25 6 MR. JOHANNINGMEIER: Okay.

09:25 7 MR. BLACK: Thank you, Your Honor.

09:25 8 So we are a couple days before trial. We have had two
09:25 9 rounds of argument, 37 pages of briefing from Theta after you
09:25 10 requested a short brief on the topic and something like 50
09:25 11 slides.

09:25 12 And we have yet to see anything that remotely approaches a
09:25 13 construction from Dr. Larson.

09:26 14 When I started doing arguments, in particular appellate
09:26 15 work, the one thing the older folks told me was when the judge
09:26 16 asks a question, you got to answer it. You can go on and say
09:26 17 other things that you'd prefer to talk about, but you got to
09:26 18 answer the question.

09:26 19 And Your Honor asked the right question at the hearing two
09:26 20 weeks ago. What was the plain meaning construction that
09:26 21 Dr. Larson used? This was the moment of truth if there was
09:26 22 ever going to be one, and I didn't hear it.

09:26 23 We have slides here that Theta has provided to the Court
09:26 24 and Slide 11 references Dr. Larson's report, but just quotes
09:26 25 from the '825 patent. It doesn't even say the words "high" and

09:26 1 "low" in it. Slide 12 is a picture of a document. It doesn't
09:26 2 mention high or low either. It's three lines from Dr. Larson's
09:27 3 report. The rest are documents that counsel spoke to, but
09:27 4 there's nothing from Dr. Larson's report explaining how he
09:27 5 reached his conclusion. That's the sum total of the record in
09:27 6 this case as to how Dr. Larson applied plain meaning.

09:27 7 I think I heard counsel say that he did use the order of
09:27 8 magnitude test. Well, if so, then we have all the problems
09:27 9 that are evident on my chart here. Because if all you need to
09:27 10 do is to show that they're 10 dB apart, then -30 dBm could be a
09:27 11 low signal and -100 could be a high signal. And in that case
09:27 12 we're entitled to judgment of noninfringement, because if
09:27 13 that's the construction he used, it's not plain meaning and
09:27 14 it's not right.

09:27 15 He talked about the worst case. And I think -- you know,
09:28 16 I don't want to be too cute here, but this is the worst of the
09:28 17 worst in a way when it comes to claim construction because they
09:28 18 proposed a construction for worst-case condition, which they
09:28 19 represent is in '825, Claims 3 and 8. That's not even what the
09:28 20 patent says.

09:28 21 The claim term is "worst-case power dissipation condition
09:28 22 from the battery." This patent is about an observation that
09:28 23 Dr. Tsividis made that when the signal strength is low and
09:28 24 there's a lot of interference, that the battery -- the power
09:28 25 consumption will be high. That's what his observation was.

09:28 1 And so the worst case in the claim is the worst-case power
09:28 2 dissipation condition. That means the state in which it's
09:28 3 consuming the most power, and the patent is about ways to
09:28 4 reduce the amount of power consumed.

09:28 5 They've got a construction here that worst-case
09:28 6 condition -- that's not even a claim term -- when a low desired
09:28 7 signal occurs with a high interferer signal. That's not a
09:29 8 construction of a claim term, and it's not a construction of
09:29 9 power dissipation condition.

09:29 10 They're trying to make these claims into a ball of mush so
09:29 11 they can get up in front of the jury and just say, oh, believe
09:29 12 me. The expert's going to put his finger up in the air and
09:29 13 say, here's which way the wind's blowing, we win.

09:29 14 I mean, I was depressed when I read one of their briefs,
09:29 15 not because of the condition of our case but depressed for the
09:29 16 condition of the law, because they actually wrote in their
09:29 17 brief -- when you asked them to explain what their expert had
09:29 18 done, they sent you a brief, the first couple of pages of which
09:29 19 were a -- where we're talking about Dr. Tsividis' resume and
09:29 20 what a wonderful professor he was and some presentation he gave
09:29 21 to Qualcomm, which has no relevance to anything at all in this
09:29 22 case.

09:29 23 And they laid out in their brief for the Court, when they
09:29 24 were supposed to be talking about what their expert did, what
09:29 25 they intend to do in front of this jury. They're going to put

09:29 1 the inventor up there and say he's a nice, esteemed man, give
09:29 2 him some money.

09:29 3 But that's not how we try patent cases. There are claims
09:30 4 that were issued by the Patent Office. These are narrow
09:30 5 claims. The broad claims they wanted, they couldn't get.

09:30 6 These claims have claim terms, "high," "low," "worst-case
09:30 7 power dissipation condition." Those have meaning. But the
09:30 8 meaning is indefinite for high and low because they have yet to
09:30 9 come up with an algorithm from which a skilled in the art -- a
09:30 10 member of skill in the art could take the numbers that are spit
09:30 11 out by that circuit and determine whether they are high or low.

09:30 12 And more importantly, even if they had come up with that,
09:30 13 they haven't disclosed it to us yet. So whatever case they're
09:30 14 going to put on is not what's in their expert reports, and
09:30 15 it's -- they did not use a plain meaning construction.

09:30 16 Now, we have had a highly prejudicial procedure going on
09:30 17 here. You asked them to give a short brief on plain meaning,
09:30 18 and they have tried to turn this into a claim construction
09:30 19 process where we have not had an opportunity to respond. We
09:30 20 have not had an opportunity to provide extrinsic evidence to go
09:31 21 through the file history. That was not what Your Honor
09:31 22 ordered.

09:31 23 We were just chided for not engaging in a supplemental
09:31 24 claim construction process that Your Honor did not order. And
09:31 25 it is not possible, if we're going to do something like that,

09:31 1 to get that done in the next couple of days for the following
09:31 2 reasons:

09:31 3 First, we need time to -- we'd need time to go through the
09:31 4 record. We'd need time to get expert reports together on this
09:31 5 point, but they've put a lot of extrinsic evidence in these
09:31 6 briefs we haven't had an opportunity to respond to.

09:31 7 They don't have an -- whatever construction Your Honor
09:31 8 would come up with is not going to be one that their experts
09:31 9 use, so it'd mean their infringement report would have to be
09:31 10 redone. Same for the invalidity reports.

09:31 11 The damages part -- the damages theory that they have is
09:31 12 tied to an argument that there's a specific amount of savings
09:31 13 and battery life that the phones would get by using the
09:31 14 invention. But if the claim construction changes, the
09:32 15 infringement's going to change. The amount of infringement's
09:32 16 going to change. Their damages numbers are going to go down.
09:32 17 We basically have to redo the whole case.

09:32 18 They shouldn't be allowed to do that. They asked for
09:32 19 plain meaning. Plaintiffs do that. I've been a plaintiff,
09:32 20 I've done it. But when you do that, you take on the burden of
09:32 21 plain meaning. And you can't come and play games at the end of
09:32 22 the case just before trial and say, oh, never mind, my expert
09:32 23 actually gave a report. We did get a construction there, but
09:32 24 now I'd like this construction so I can try to fix things two
09:32 25 days before trial over the holidays. It's not right. It's not

09:32 1 fair. And it violated your order on plain meaning.

09:32 2 Thank you, Your Honor.

09:32 3 MR. JOHANNINGMEIER: May I briefly respond?

09:32 4 THE COURT: Sure.

09:32 5 MR. JOHANNINGMEIER: Just to address the point on needing
09:32 6 time. He mentioned extrinsic evidence that we cited. We got
09:33 7 that extrinsic evidence from their invalidity report and
09:33 8 textbooks that were cited in their invalidity report. [REDACTED]

09:33 9 [REDACTED]

09:33 10 [REDACTED]

09:33 11 [REDACTED] So it's -- you know, it's basically support for
09:33 12 what we've been saying all along. There's nothing new in our
09:33 13 briefs that wasn't added by their expert.

09:33 14 Now, on the construction, again, as we said, we think that
09:33 15 this could be done without a construction simply by precluding
09:33 16 their expert from misusing plain meaning. But to the extent
09:33 17 that Your Honor wants to give something definite to the jury
09:33 18 that will make that concrete, we offered proposals that are, of
09:33 19 course, consistent with the analysis that we gave. The
09:34 20 proposals are consistent with what Dr. Larson did.

09:34 21 Nothing has to change in his report. The input signal
09:34 22 spectrum, being a low, combining with a signal that's high
09:34 23 relative to the desired signal strength gets the concept that
09:34 24 these things are relative into their -- the worst-case
09:34 25 construction gets that these things are -- the worst case is

09:34 1 when a low signal is (interruption) with a high signal. It's
09:34 2 not the maximum ends of the range, right?

09:34 3 These are designed to give authority (interruption) to the
09:34 4 jury without breaking the case. You know, as if we were doing
09:34 5 this during the trial which sometimes happens. Now we're doing
09:34 6 it right before trial to the extent that we want to make sure
09:34 7 that the jury isn't hearing competing definitions of plain
09:34 8 meaning.

09:34 9 One way to do that is by precluding them from saying some
09:34 10 of the things they've said, either now or as it comes up in
09:35 11 trial. Another way to do that is to give a construction that
09:35 12 would rule out shenanigans. So that's why we've offered this.
09:35 13 There's nothing inconsistent. We aren't going to have to redo
09:35 14 our power calculation number. They could have come back with a
09:35 15 kind of proposal. They chose instead to just argue for
09:35 16 reconsideration of Your Honor's ruling last year that these are
09:35 17 definite.

09:35 18 So the prejudice here would be, if Your Honor was to agree
09:35 19 with them, we would have spent a year doing a case on plain
09:35 20 meaning based on Your Honor's order, putting up all of these
09:35 21 experts' reports, everything else. Everything we've been doing
09:35 22 would basically be overturned because they didn't like the
09:35 23 result a year minus two days ago.

09:35 24 That result should stand. These claims are definite.

09:35 25 And that's all I have. Thanks.

09:36 1 (Off-the-record bench conference.)

09:39 2 THE COURT: The Court is going to overrule the motion for
09:39 3 summary judgment and maintain the construction of plain and
09:39 4 ordinary meaning.

09:39 5 The next issue to take up is Samsung's summary judgment of
09:40 6 noninfringement. Who will be arguing that?

09:40 7 MR. CORDELL: I will, Your Honor.

09:40 8 THE COURT: Mr. Cordell?

09:40 9 MR. CORDELL: Thank you.

09:40 10 May I proceed, Your Honor?

09:40 11 THE COURT: Yes, sir.

09:40 12 MR. CORDELL: Ruffin Cordell for Samsung.

09:40 13 Your Honor, we're here this morning to talk about our
09:40 14 motion for summary judgment for noninfringement, and I'm going
09:40 15 to focus on three principal grounds. And it's a little bit
09:40 16 complicated in this case because we've got an array of claims
09:41 17 and we have to make successive arguments in order to reach each
09:41 18 of the asserted claims.

09:41 19 But essentially, the arguments are spread across the claim
09:41 20 pattern. Your Honor's very familiar with these patents.
09:41 21 They're very repetitive. We see the same claim terms, same
09:41 22 claim elements appearing in multiple patents. And so the
09:41 23 arguments are grouped as follows:

09:41 24 There's the no worst-case condition, when the interferer
09:41 25 is high. And you've already had a fair amount of argument

09:41 1 about worst case this morning, but I'm going to continue that;

09:41 2 That there's no required bias adjustments to compensate
09:41 3 for as the system departs from that worst-case condition, which
09:41 4 is a key element of these patents, the idea that when we are in
09:41 5 a worst-case condition and we exit that worst-case condition
09:41 6 there is a prescribed bias adjustment;

09:41 7 And then, finally, you heard some argument this morning
09:41 8 about this notion that you have a desired signal and an
09:42 9 interferer signal and that there must be a comparison. That
09:42 10 some of the claims require a direct comparison between the two.
09:42 11 And it's simply just not done in the accused systems, and
09:42 12 there's no evidence of it in this case.

09:42 13 And essentially what we're talking about here is a
09:42 14 no-evidence summary judgment. The plaintiff took us to task
09:42 15 and said that our motion papers were terse and we were -- you
09:42 16 know, weren't verbose, which I normally appreciate. I'm not
09:42 17 ashamed of that. But these are no-evidence motions. The point
09:42 18 is that we've challenged them to put in the evidence necessary
09:42 19 to survive summary judgment, and they just didn't do it.

09:42 20 So let's start with the first argument about the no
09:42 21 worst-case condition. It applies to the '825 and '202 patents,
09:42 22 Claims 3, 8, 7 and 13.

09:42 23 And the notion is this: And I've got examples from each
09:42 24 of the patents, the '825, Claim 3, for example, wherein a
09:42 25 worst-case power dissipation condition from the battery results

09:42 1 when the signal strength of the desired signal is low and the
09:43 2 signal strength of the interferer signal is high.

09:43 3 Now, we just had a debate about what low and high mean.
09:43 4 And we understand the plain meaning construction that the Court
09:43 5 has prescribed. But the worst case is a little bit different,
09:43 6 and it's important. It's important because these claims have
09:43 7 to mean something, right? We have to know -- we have to be
09:43 8 able to stand in front of this jury and, you know, I'm feeling
09:43 9 for these folks. They're going to be asked to make these
09:43 10 complicated technical decisions based on, you know, what
09:43 11 appears to me, at least, to be a fair number of different
09:43 12 statements from the plaintiff about what this means.

09:43 13 Well, what the patent tells us, what the patent tells us
09:43 14 over and over again is that interferer high and desired signal
09:43 15 low is that worst case. It's a thing. It's not a moving
09:43 16 target. It's not something that changes on Tuesday versus
09:43 17 Thursday. It is a thing.

09:44 18 And when we start from that perspective, the patents
09:44 19 actually begin to make some sense. The idea is that in the
09:44 20 past we had a situation where the -- all of the receivers had
09:44 21 to be tuned for that worst case. You had to be able to recover
09:44 22 that really soft signal against a very loud noise. And so you
09:44 23 cranked up the power. That's the way they worked. And the
09:44 24 whole notion of these patents is that you needed to have that
09:44 25 power there so you could recover that low desired signal.

09:44 1 You start from that point over and over and over again.
09:44 2 And what these patents talk about and Dr. Tsividis' entire
09:44 3 contribution was, was to point out, well, sometimes that
09:44 4 interferer signal comes down and you could turn the power down
09:44 5 a little bit. That's the basic notion. But we have to have
09:44 6 that starting point. We have to have the worst case or none of
09:44 7 this makes sense. And they just haven't been able to show that
09:44 8 in the accused devices.

09:44 9 So what do they do? They look at the accused devices --
09:45 10 and I'll describe this generally, Your Honor. [REDACTED]

09:45 11 [REDACTED]
09:45 12 [REDACTED]
09:45 13 [REDACTED]
09:45 14 [REDACTED]
09:45 15 [REDACTED]
09:45 16 [REDACTED]
09:45 17 [REDACTED]
09:45 18 [REDACTED]
09:45 19 [REDACTED]
09:45 20 [REDACTED]
09:45 21 [REDACTED]

09:45 22 So what Dr. Larson says is the worst case, the highest
09:45 23 power consumption, this Gain State 0, actually corresponds to
09:45 24 when the desired signal and the interferer signal are at their
09:46 25 lowest. We don't have this high interferer/low desired signal

09:46 1 characteristic. It's completely different because the accused
09:46 2 systems work by measuring the amount of power and then trying
09:46 3 to keep the output constant.

09:46 4 So if the input signals are low, the interferer and the
09:46 5 received signals are low, they crank up the power a little bit
09:46 6 because they want the output to be at a determined level. If
09:46 7 they're high, they crank the power down. They do exactly the
09:46 8 opposite of what the patent tells us.

09:46 9 But here's Dr. Larson's problem and Theta's problem. They
09:46 10 say, okay. Gain State 0 is the worst case. That's the one
09:46 11 where the power is maximum. That's the one where you're going
09:46 12 to have all your losses. But then he also has to admit that in
09:46 13 Gain State 0 that interferer is very low. We don't have a high
09:46 14 signal here. We have two low signals.

09:46 15 And he points out that Gain State 0 is the worst case. He
09:47 16 admits that in his expert report. He talks about it. I have
09:47 17 it here in Paragraph 137. He also talks about the Gain State 0
09:47 18 being the worst case in Paragraph 143. He says: The lowest
09:47 19 worst-case gain state, e.g., G0.

09:47 20 He didn't give us any other e.g.s. Only G0, Gain State 0,
09:47 21 was the one that he pointed to. He said: It's the highest
09:47 22 power dissipation in all the components. It's the worst-case
09:47 23 gain state. It is exactly what the patent describes.

09:47 24 But then when we turn to the infringement side of the
09:47 25 coin, he can't make it out. He can't make it out because he

09:47 1 has to admit that in Gain State 0, then it's a very small
09:47 2 received signal power, both desired and interferer.

09:47 3 We don't have that worst case. We don't have the high
09:47 4 interferer and the low desired under any definition, frankly,
09:48 5 because he readily admits that it's a very small received
09:48 6 signal power for both signals.

09:48 7 So they simply just don't have the worst case. They can't
09:48 8 meet the basic threshold of these patents and particularly in
09:48 9 these claims.

09:48 10 Now, you know, they've -- in response, they said, well,
09:48 11 there could be multiple worst cases. Well, there's really not.
09:48 12 You know, there's a -- these patents talk about the worst case,
09:48 13 and they talk about it specifically. They talk about it over
09:48 14 and over again.

09:48 15 If what they wanted to do was to nibble around the edges
09:48 16 and say for a particular device it might be different because
09:48 17 of the way the system is set up, that might be one thing. But
09:48 18 what they're suggesting is that in the same device you could
09:48 19 have a different worst case from moment to moment to moment,
09:48 20 and that's simply not the way these patents are constructed.

09:48 21 They -- in their expert report, Dr. Larson, you know, made
09:48 22 it very clear that G0 is the gain state that he -- he's
09:48 23 pointing to. They have to be held to their representations at
09:49 24 some point. We have to be able to try this case on a rational
09:49 25 and fair basis.

09:49 1 And if they're now going to throw that out the window and
09:49 2 go hunting and pecking for some other set of facts, number one,
09:49 3 that's not in his expert report, so it shouldn't be permitted;
09:49 4 but number two, it's just not allowed.

09:49 5 And the summary judgment process is really designed to
09:49 6 make sure that that doesn't happen, right? They should have
09:49 7 come forward with evidence that they had previously put in, not
09:49 8 attempt to supplement the record at this late stage.

09:49 9 And so the -- the reality is, the patents talk about high
09:49 10 interference/low signal. And when that happens, you
09:49 11 dynamically -- you dynamically change the bias current so that
09:49 12 you can ultimately achieve these power savings, and they just
09:49 13 don't have it.

09:49 14 I show the '202 patent, Claim 7 and 13, that have the same
09:49 15 worst-case characteristic.

09:49 16 So at the end of the day, Your Honor, they just don't have
09:50 17 the worst case. They simply don't. What they pointed to was
09:50 18 G0. G0 does not fit any definition of worst case that we've
09:50 19 heard. It doesn't have the high interferer. It perhaps has a
09:50 20 low signal, but you got to have both in order to have the worst
09:50 21 case. And they just can't make it out.

09:50 22 So they can't leave here and go forward on those claims
09:50 23 without demonstrating to you that in G0 that interferer signal
09:50 24 or the jammers, or whatever they want to call them, come in
09:50 25 high. And if they can't do that, then they can't survive

09:50 1 summary judgment. It's just that simple.

09:50 2 Let's talk about bias adjustments. So this is in the '202
09:50 3 patent, Claim 13, and the '962 patent, Claim 1.

09:50 4 Now, what are the bias adjustments?

09:50 5 So I've got Claim 1 of the '962, and there are really two
09:50 6 flavors of this. One is, it starts again at the worst case,
09:50 7 when the signal strength of the interferer signal is high and
09:50 8 the signal strength of desired signal is low, then the bias
09:50 9 current is increased.

09:50 10 So that's our worst case. That's the streaming that
09:51 11 these -- that these patents, you know, talk about. Making sure
09:51 12 that power's cranked way up so that whatever little desired
09:51 13 signal is there gets passed on down the line and can be
09:51 14 recovered. That is the fundamental first step of every single
09:51 15 one of these claims.

09:51 16 It then goes on in little Roman iii and tells us that when
09:51 17 we -- so remember, we start at the worst case. And then it
09:51 18 says: When the signal strength of the interferer is low and
09:51 19 the signal strength of the desired signal is low, the bias
09:51 20 current of the circuit in the receiver signal path of wireless
09:51 21 transceiver is reduced.

09:51 22 So when we started at the worst case and when the
09:51 23 interferer comes down, the entirety of these inventions talk
09:51 24 about -- or alleged inventions I should say -- talk about
09:51 25 turning down the power. You save some power when that

09:51 1 interferer signal comes down. But you got to have a starting
09:51 2 point. If you don't have a starting point, this all becomes
09:52 3 meaningless.

09:52 4 What we've seen from Theta in the summary judgment process
09:52 5 is an effort to essentially be divorced from any
09:52 6 cause-and-effect relationship whatsoever. They look for any
09:52 7 modification of the bias current, and they say, aha, there's
09:52 8 been a modification of the bias current and that's all that
09:52 9 matters.

09:52 10 But that's not what this says. This says a condition when
09:52 11 the signal strength of the interferer falls, you've got to
09:52 12 reduce the bias current. You start at that worst case, when it
09:52 13 falls, you reduce the bias current. Otherwise these claims
09:52 14 really have no meaning. That ball of mush that Mr. Black
09:52 15 talked about, you know, becomes manifest. They have to meet
09:52 16 these precise claim elements.

09:52 17 So, you know, Dr. Larson points out that, you know, if you
09:52 18 are increasing interference, that the bias current has to go
09:53 19 up. That's his fundamental tenet, that's the fundamental under
09:53 20 current of the patent case.

09:53 21 [REDACTED]
09:53 22 [REDACTED]
09:53 23 [REDACTED]
09:53 24 [REDACTED]
09:53 25 [REDACTED]

09:53 1 So it's a little bit like, you know, when I got ahold of
09:53 2 my sister's stereo set when I was a kid, her Harman Kardon that
09:53 3 she really loved, and all I could do was screw it up. And I,
09:53 4 of course, would crank it up all the time. And she would yell
09:53 5 at me because I was going to blow out our speakers.

09:53 6 [REDACTED]
09:53 7 [REDACTED]
09:53 8 [REDACTED]
09:53 9 [REDACTED]
09:53 10 [REDACTED]
09:53 11 [REDACTED]
09:54 12 [REDACTED]
09:54 13 [REDACTED]

09:54 14 So they have a fundamental problem. [REDACTED]
09:54 15 [REDACTED]
09:54 16 [REDACTED]
09:54 17 [REDACTED]
09:54 18 [REDACTED]
09:54 19 [REDACTED]
09:54 20 [REDACTED]

09:54 21 That's what these -- the accused systems actually do as
09:54 22 opposed to all of the stuff that we've seen in the patent. So
09:54 23 what do they do? [REDACTED]

09:54 24 [REDACTED]
09:54 25 [REDACTED]

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[REDACTED]

So Theta, you know, seems to acknowledge there's been a little bit of a dispute about whether bias current and gain are coincident, but I don't think that there really is a dispute about that. I think everybody understands that when you reduce the bias current, you reduce gain; when you increase the bias current, you increase gain. So I don't need to spend much time on that.

So again, Your Honor, fundamentally, they've got a problem. Theta's patents tell us, as the interference goes up, you increase the bias current, crank up the juice. And in the accused products, it's just the opposite. And they've got a problem that they can't deal with.

So what do they say?

They say, well, we're going to come up -- in summary judgment, we're going to give you two new theories. The first one is the starting point theory, and then the second is the components theory. And I'll take them each in turn.

So with the starting point theory, what they're basically saying is, look. You can't be distracted by those claim

09:56 1 elements. You can't be distracted by the idea that you're
09:56 2 supposed to start from a worst case and then you come down from
09:56 3 that.

09:56 4 What they're saying is that, look. If there's any time
09:56 5 you're making adjustments to the bias current and the gain,
09:56 6 then that's good enough. We don't need to worry about those
09:56 7 pesky worst-case recitations in the claims.

09:56 8 But that's not what the claims say. The claims -- and in
09:56 9 their opposition, they talk about the idea that, you know,
09:56 10 every time you make an adjustment, you're doing it in response
09:56 11 to some signal changing. This is from their opposition where
09:56 12 they tell us that the measured signal strengths transition are
09:56 13 sometimes at a high level.

09:56 14 Now, this is a bit of a misnomer. They say high
09:56 15 desired/high interferer. Well, the part has no knowledge of
09:56 16 this. I used to work with a guy that would say that all the
09:56 17 time. Because the Samsung devices just don't know. They don't
09:57 18 know whether it's a high interferer and a high desired signal.
09:57 19 All they know is that it's -- we're getting a high amount of
09:57 20 power in the receiver from whatever source.

09:57 21 And so what they're doing here is they're saying, well,
09:57 22 look. If you have that, that could be a worst case; and then
09:57 23 when you transition down from that, then perhaps you'll be, you
09:57 24 know, moving into a low -- a lower signal level.

09:57 25 But, Your Honor, the reality here is when that happens,

09:57 1 you get an increase in bias current, not a decrease. And they
09:57 2 actually tell us that at the end of this particular paragraph.

09:57 3 So imagine that we're going to allow them to shift around
09:57 4 and make their worst case a -- you know, a high-high and then
09:57 5 go to a low, which is nowhere in these patents, but it results
09:57 6 in an increase in bias current, not a decrease. So we're not
09:57 7 saving power, we're actually wasting power.

09:58 8 And the claim elements are pretty specific here. We can't
09:58 9 simply ignore that. We know that there are two separate,
09:58 10 distinct requirements.

09:58 11 And so we can't just pick and choose any one case and say,
09:58 12 well, you know, for Claim Element, you know, i, we're going to
09:58 13 look at the system on Tuesday; and for iii, we're going to look
09:58 14 at it on Thursday.

09:58 15 The system is the system, and the conditions that are set
09:58 16 forth have to be satisfied. You've got to satisfy each and
09:58 17 every one of them.

09:58 18 And it tells us that when the signal strength of the
09:58 19 interferer is low and the signal strength of the desired signal
09:58 20 is low, the bias current is reduced. So we can stop right
09:58 21 there for Claim 1 of the '962 patent, because whatever
09:58 22 definition change they give it, the interferer signal is low
09:58 23 and the desired signal is low.

09:58 24

09:58 25

09:58 1 [REDACTED]

09:59 2 [REDACTED]

09:59 3 [REDACTED]

09:59 4 And on Slide 23, I've reproduced part of what they're --

09:59 5 they're pointing to the chart again. [REDACTED]

09:59 6 [REDACTED]

09:59 7 [REDACTED]

09:59 8 [REDACTED]

09:59 9 [REDACTED]

09:59 10 [REDACTED]

09:59 11 [REDACTED]

09:59 12 [REDACTED]

09:59 13 [REDACTED]

09:59 14 So now they moved to a different argument. They say,

09:59 15 well, it could be components. You could have different parts

09:59 16 along the signal pathway. Where in one of them you might have

09:59 17 a bias current increased or decreased. Well, that's a

09:59 18 completely new position. And you know that because what they

09:59 19 reproduced in their brief was a bunch of annotations that the

09:59 20 lawyers have added, not what their expert talked about. And

10:00 21 that of course is not the way we try cases.

10:00 22 I think that theory is completely wrong. I think there's

10:00 23 no evidence of this. I think they're just guessing at the

10:00 24 different components along the pathway. But what we absolutely

10:00 25 can't do is let them supplement their expert's report with

10:00 1 attorney annotations on a document.

10:00 2 And, you know, perhaps most importantly, when we asked
10:00 3 Dr. Larson about this, he was pretty candid that he didn't do
10:00 4 that analysis. He didn't do this component-by-component
10:00 5 analysis. And he's pretty -- was pretty candid with us that
10:00 6 it's not in this report. And as you know, if it's not in a
10:00 7 report, it's not in the trial. And that's really where that
10:00 8 should stop.

10:00 9 There's one other point on the components argument that I
10:00 10 should raise, which is the only analysis they've done was of
10:00 11 the Beamer version of the products. But there are six or seven
10:00 12 other versions. So if the only evidence they have is for the
10:01 13 Beamer design documents, then that's deficient. That leaves
10:01 14 out a large swath of the products.

10:01 15 So with that, there just is no required adjustments. The
10:01 16 fundamental tenet of these patents is when you go from high to
10:01 17 low, you turn down the power. It's exactly the opposite in the
10:01 18 accused devices, and they need to explain that to you if they
10:01 19 want to proceed.

10:01 20 So finally, the comparing to the desired interferer.
10:01 21 We've heard over and over again this morning how important the
10:01 22 high interferer and low signal is, low desired signal. And
10:01 23 that comparison is manifest in the '202 patent in Claim 7 and
10:01 24 13.

10:01 25 And you see it on Slide 28, the claim elements actually

10:01 1 require that you do a comparison. You have to compare the
10:01 2 strength. You got to ascertain the strength of the desired
10:01 3 signal relative to the strength of interferer signal. That
10:01 4 means you got to measure them or know what they are in some
10:01 5 fashion and you got to compare one to the other.

10:01 6 There might be different ways to do that. I have, you
10:01 7 know, three children and I can compare their heights. I can
10:02 8 put them back to back. I can measure them and look at numbers.
10:02 9 There are a lot of different ways I could do that, but you got
10:02 10 to make the comparison. I've got to know how tall they are and
10:02 11 I've got to compare them in order to satisfy that element. The
10:02 12 same is true with these signals.

10:02 13 In Dr. Larson's report we were very keen to look for
10:02 14 these. We were very keen to try to find where he was going to
10:02 15 do this, because we don't see the comparison anywhere. So we
10:02 16 studied long and hard. And it's funny, he talks about it, and
10:02 17 he says, oh, it's in there. It's like the pasta sauce. It's
10:02 18 in there somewhere.

10:02 19 [REDACTED]
10:02 20 [REDACTED]
10:02 21 [REDACTED]
10:02 22 [REDACTED]
10:02 23 [REDACTED]
10:03 24 [REDACTED]

10:03 25 But he doesn't do that. He doesn't show us where they're

10:03 1 doing any comparison. He doesn't tell us where they're doing
10:03 2 any measurement. And in order for me to know whether my one
10:03 3 kid is taller than the other, I got to do the measurement. If
10:03 4 I don't do the measurement and then I don't do the comparison,
10:03 5 I obviously haven't accomplished the process.

10:03 6 And that's it. What we show on Slide 29 is the sum total
10:03 7 of his analysis of these comparison elements. And it's a
10:03 8 problem, right? We're supposed to try this case. We're
10:03 9 supposed to determine whether or not these parts do these
10:03 10 claims, and we just can't do it.

10:03 11 So we asked him in deposition. You know, Dr. Larson,
10:03 12 where is it? You know, with those same paragraphs, where is it
10:03 13 that you show us, that you're ascertaining those signals and
10:03 14 then you're doing a comparison? And he said, well, I haven't
10:03 15 explicitly shown that.

10:03 16 And when he says that the adjacent channel signal to the
10:03 17 desired signal, the adjacent channel is really another way of
10:04 18 saying the noise, you know, the non-desired signals. I haven't
10:04 19 shown that. He was pretty candid.

10:04 20 So how are we supposed to try this case, Your Honor? How
10:04 21 am I supposed to cross-examine him and show the jury that he
10:04 22 didn't do this? Because what I'm going to get is what I got in
10:04 23 their summary judgment motion. What I got in their summary
10:04 24 judgment opposition was a citation to a bunch of impenetrable
10:04 25 source code. A bunch of signal pathways and symbols that are,

10:04 1 you know, 18 characters long, each and every one of them. And
10:04 2 they don't show any such comparison. I got two and a half
10:04 3 pages of attorney argument.

10:04 4 And you can see it at Pages 17 and 18 of their brief. I
10:04 5 wish I'd blown this up a little better, but you can see some of
10:04 6 the source code that they cite.

10:04 7 So what they've got is they've got their lawyer standing
10:04 8 up and saying, well, we can find the comparison. We're going
10:04 9 to show this jury a bunch of impenetrable technical documents
10:04 10 that make no sense to real people and never say the word
10:04 11 "comparison." There's not a real-world cue that they can pick
10:05 12 up from these.

10:05 13 And so what we're left with is their expert saying, at a
10:05 14 very high level, it's in there. And that's as far as they'll
10:05 15 go. And it's just not fair at the end of the day.

10:05 16 So it's -- you know, the orderly process of these cases is
10:05 17 supposed to be that we get the evidence. When we file a
10:05 18 no-evidence summary judgment motion, they come forward with
10:05 19 something we can actually point to or they can point to, and
10:05 20 that just didn't happen here.

10:05 21 So at the end of the day, Your Honor, there is no evidence
10:05 22 of this comparer, and Claims 7 and 13 should be adjudicated
10:05 23 now.

10:05 24 And with that, unless there are any questions, I'll pass
10:05 25 the podium.

10:05 1 THE COURT: Very good.

10:05 2 MR. CORDELL: Thank you.

10:05 3 THE COURT: If it doesn't screw you up too much to do it
10:05 4 this way, if you could address the comparison issue to start
10:05 5 off with --

10:05 6 MR. JOHANNINGMEIER: Yes. Sure, Your Honor.

10:05 7 THE COURT: -- since it's the freshest in my mind.

10:05 8 MR. JOHANNINGMEIER: Yes. And actually, let's see. For
10:06 9 that one maybe we should go with the paper slides --

10:06 10 THE COURT: Okay.

10:06 11 MR. JOHANNINGMEIER: -- because I've got code on them.

10:06 12 (Off-the-record discussion.)

10:06 13 MR. JOHANNINGMEIER: So let's go with -- it's starting at
10:06 14 Slide 45.

10:06 15 MS. DE MORY: Can I ask just a clarified question? Does
10:06 16 this screen -- is this shown publicly?

10:06 17 THE COURT: I don't think so.

10:06 18 MS. DE MORY: Yeah. And I don't think there's anyone in
10:06 19 the courtroom who can't see it, and I think Mr. Cordell put
10:06 20 some source code in the confidential documents on the screen as
10:06 21 well.

10:06 22 MR. CORDELL: I tried not to. Not anything extensive,
10:06 23 other than just a gain state document.

10:07 24 MR. JOHANNINGMEIER: Well, I don't want to mess anyone up.
10:07 25 I mean, I'm happy to use the paper. I mean, I just...

10:07 1 MR. CORDELL: One of the issues we're going to have to
10:07 2 confront sooner or later, Your Honor, is unfortunately
10:07 3 Mr. Kahng from Samsung is here, and Samsung and Qualcomm are
10:07 4 competitors.

10:07 5 So when we show Qualcomm's source code, they get very
10:07 6 agitated about showing that to Qualcomm (sic). So we're going
10:07 7 to -- one of the things we're going to have to deal with in
10:07 8 trial is, I'm going to have to excuse our client
10:07 9 representatives whenever we go into that.

10:07 10 THE COURT: Understood. Let's move forward. And if the
10:07 11 Samsung counsel believes you're showing anything that needs to
10:07 12 be taken down, just take it down and I'll --

10:07 13 MR. JOHANNINGMEIER: Okay.

10:07 14 THE COURT: Yeah. I don't think there will be any harm
10:07 15 done --

10:07 16 MR. CORDELL: So for example, Your Honor, this algorithm,
10:07 17 I think, is part of the Qualcomm --

10:07 18 THE COURT: Got it. And so Qualcomm might have a concern.

10:07 19 MR. JOHANNINGMEIER: Let's take this slide off.

10:07 20 THE COURT: Okay.

10:07 21 MR. JOHANNINGMEIER: Okay. So address the comparison one
10:07 22 first as to the '202 patent.

10:08 23 Mr. Cordell's description of what happened isn't exactly
10:08 24 accurate. Dr. Larson didn't say he hadn't shown this. He got
10:08 25 a lot of questioning. The form of the questioning was sort of,

10:08 1 where is it in this paragraph? He has a long report. His
10:08 2 report cross-references -- they were looking at particular
10:08 3 paragraphs and saying where was it?

10:08 4 And, you know, to be completely honest, he didn't remember
10:08 5 at the time the source code citations that are elsewhere. But
10:08 6 it's in his report. It's clearly in his report. And you can
10:08 7 see on this slide we cited it from his report.

10:08 8 So this is a no-evidence summary judgment motion. We put
10:08 9 the evidence in the brief, his testimony, right? His
10:08 10 testimony's very clear. He thinks the comparison is done.
10:08 11 He's got examples of it. It's lengthy. I won't belabor it or
10:08 12 go through it all.

10:08 13

10:08 14

10:09 15

10:09 16

10:09 17

And

10:09 18

10:09 19

10:09 20

Dr. Larson says that is a comparison, right? I mean, you're
taking a difference between two numbers and then comparing the
second one to a threshold. He says that meets it.

10:09 21

10:09 22

10:09 23

10:09 24

10:09 25

On summary judgment the Court can't decide he's wrong.
This is a -- this is evidence that's in the case that we can
present. Now, counsel can call it impenetrable. He can accuse
it of being attorney argument. It's not attorney argument, it
is the evidence in the case.

10:09 1 So there is a subtraction --

10:09 2 THE COURT: And maybe I just had a senior moment. I was
10:09 3 reading something from one of my clerks. But the information
10:09 4 that is in -- that Mr. Cordell referenced that was in the
10:09 5 lawyer documents, is all that information -- was that all
10:09 6 disclosed in the expert's report as well?

10:10 7 MR. JOHANNINGMEIER: Yes. So he cites to this code. He
10:10 8 cites to these documents.

10:10 9 THE COURT: Okay. I'm just saying, maybe I misunderstood
10:10 10 what Mr. Cordell said, that you all had -- I got the sense that
10:10 11 you all had supplemented what had been done in what was filed.
10:10 12 And I just -- what I'm trying to figure out is what you used
10:10 13 for supplementation, was it already in the expert's report?
10:10 14 Did he rely on it?

10:10 15 MR. JOHANNINGMEIER: It's cited. So this one here in
10:10 16 particular, just to use an example, is from documents that he
10:10 17 cited, and so -- and code that he cited.

10:10 18 Now, we looked at thousands and thousands of code files.
10:10 19 I think there's 5,000 pages of printed source code. So he
10:10 20 didn't go line by line and put it all in there, but he cited
10:10 21 to -- he did actually cite to this particular code file in his
10:10 22 report and these particular lines that we've put here.

10:10 23 Now, it's not in the paragraph, that 212 that he
10:10 24 mentioned. It's in another paragraph in another section that
10:11 25 he cross-references. He says, as in, you know, element

10:11 1 whatever, I described this in conjunction with this algorithm.
10:11 2 And then he mentions this flowchart and he cites this document.
10:11 3 He doesn't reproduce the flowchart in his report. We put it
10:11 4 here, but he does cite to it. So it's disclosed to the other
10:11 5 side. I mean, they can try to penetrate the source code. I
10:11 6 mean, I realize it's complicated stuff, but we've pointed out
10:11 7 what we were relying on in the report for this stuff.

10:11 8 So this is, you know, just one example and then there's
10:11 9 testimony in our brief on these as well. There's another
10:11 10 example, the second one on here is this deficit bias
10:11 11 calculation.

10:11 12 Now, again, he cites to this file. He doesn't
10:11 13 specifically discuss this calculation, but these are all
10:11 14 documents that are in his report. I actually did some of this
10:11 15 code with Dr. Kiaei, their expert, and he talked about it as
10:12 16 well and gave some admissions on it that, you know, as we say
10:12 17 in our brief, are also sufficient to defeat summary judgment.

10:12 18 So there is, we think, ample evidence in the case of
10:12 19 multiple places where this comparison stuff is done.

10:12 20 Now, they may disagree with Dr. Larson's interpretation
10:12 21 about whether or not a subtraction followed by a threshold
10:12 22 comparison is equal to the claims, but that's just, you know,
10:12 23 for the jury to hear. It's not summary judgment. There is a
10:12 24 genuine issue here about whether comparison was done.

10:12 25 So if Your Honor doesn't have any more questions on that,

10:12 1 I can switch to the other one.

10:12 2 THE COURT: Sure.

10:12 3 MR. JOHANNINGMEIER: Okay. So they did worst case first,
10:12 4 so let's talk about that one. And then we can put this one up
10:12 5 on the screen -- this is Slide 44 -- or you can look at it.

10:12 6 So the bottom line on this is that Dr. Larson did find the
10:13 7 worst case in Gain State 0. They suggested he did not. He
10:13 8 did.

10:13 9 Their belief that he did not is based on the argument I
10:13 10 mentioned a little bit earlier about how their expert says,
10:13 11 well, a -45 dBm jammer can't be high because there's other
10:13 12 states where there's higher jammers.

10:13 13 [REDACTED]
10:13 14 [REDACTED]
10:13 15 [REDACTED]
10:13 16 [REDACTED]
10:13 17 [REDACTED]
10:13 18 [REDACTED]
10:13 19 [REDACTED]
10:13 20 [REDACTED]
10:13 21 [REDACTED]
10:14 22 [REDACTED]
10:14 23 [REDACTED]
10:14 24 [REDACTED] Those are

10:14 25 in there as well.

10:14 1 The -- this worst case isn't only limited to Gain 0.
10:14 2 That's their interpretation of this, but it's not. But he did
10:14 3 find it in Gain 0, so their summary judgment motion has to be
10:14 4 denied just based on that point.

10:14 5 He found it in other places. I think it was -- that's
10:14 6 actually on the earlier slides. In 12 and 13, you can see it
10:14 7 in the -- on Slide 13, you can see the same worst-case scenario
10:14 8 with the low interferer and the high jammer in other gain
10:14 9 states, Gain State 1, Gain State 2.

10:14 10

10:14 11

10:14 12

10:15 13 And he found that in each one of
10:15 14 those, which is why, when asked in deposition, he testified
10:15 15 that there could be multiple worst cases at different points in
10:15 16 the overall range of the device.

10:15 17 They're suggesting that that's not right, that you can
10:15 18 have only, you know, the very lowest of the low and the very
10:15 19 highest of the high. That's just not the plain meaning of this
10:15 20 term. So we're kind of back to the same argument here.

10:15 21 But at bottom, he did find it in Gain State 0. He
10:15 22 described how the chip reacts to that, what it does. It does
10:15 23 do the required adjustment from that point. When the -- when
10:15 24 it's in the worst case and the signal goes up, it does the
10:15 25 required adjustment to the bias that's in the claims. And

10:15 1 that's clearly in his report.

10:15 2 So this is just another one where the evidence is there.

10:15 3 We put it in our brief. Their one page on this no-evidence

10:15 4 summary judgment motion should be denied.

10:16 5 And then, finally, on the bias adjustment one, you can

10:16 6 look at Slide 40 and 41.

10:16 7 Now, Claim 1 of the '962 and Claim 13 of the '202 have a

10:16 8 clause that requires a decrease in response to a particular

10:16 9 change. The other claims have a different requirement where

10:16 10 the bias current would be increased in similar situations.

10:16 11 Those aren't at issue for this.

10:16 12 So the claims at issue here, Claim 1, they filed a motion

10:16 13 saying we hadn't shown this anywhere. [REDACTED]

10:16 14 [REDACTED]

10:16 15 [REDACTED]

10:16 16 [REDACTED]

10:16 17 [REDACTED]

10:16 18 [REDACTED]

10:17 19 [REDACTED]

10:17 20 [REDACTED]

10:17 21 Now, he also said that has to be in Gain 0. The only

10:17 22 place this could happen is Gain 0. Well, that's just nonsense,

10:17 23 that's not what the claim requires. That's something that

10:17 24 they've attempted to impose on this. That -- it's just -- it

10:17 25 doesn't come from anywhere.

10:17 1 So he showed this. Now, these annotations in red are
10:17 2 stuff that we put on to explain it, but these charts are in his
10:17 3 report. And he explained it in his deposition, as is in our
10:17 4 brief.

10:17 5 Now, we heard -- I heard Mr. Cordell talk about the total
10:17 6 power. Well, let me be clear here. There is a total power,
10:17 7 the RSSI, but in their own brief at Page 4 they admit that that
10:17 8 is a combination of the desired strength and the interferer
10:17 9 strength. [REDACTED]

10:18 10 [REDACTED]

10:18 11 [REDACTED]

10:18 12 [REDACTED]

10:18 13 [REDACTED]

10:18 14 [REDACTED]

10:18 15 [REDACTED]

10:18 16 [REDACTED]

10:18 17 [REDACTED] And so it meets the claim

10:18 18 elements. And when it does -- when the code reacts to an

10:18 19 increase by decreasing, as we see here, then it meets these

10:18 20 particular elements of the claims. So this is evidence of

10:18 21 those elements being met in those gain state transitions for

10:18 22 these two products.

10:18 23 [REDACTED]

10:18 24 [REDACTED] And this is one

10:19 25 where actually Dr. Larson mentioned this in his depo. It's in

10:19 1 his report. [REDACTED]

10:19 2 [REDACTED]

10:19 3 [REDACTED]

10:19 4 [REDACTED] So it's an example of infringement

10:19 5 of these particular claims. So this is the evidence for their

10:19 6 no-evidence summary judgment motion. The motion should be

10:19 7 denied.

10:19 8 Again, I heard Mr. Cordell say that Larson -- Dr. Larson

10:19 9 didn't do the analysis and didn't do it. It's not in his

10:19 10 report. He didn't say that. He did the analysis. It's in his

10:19 11 report. These are the examples.

10:19 12 They want to say that these little -- that these

10:19 13 individual transitions don't matter, but they do. These

10:19 14 individual transitions infringe when that happens in the

10:19 15 circuit. And then the overall -- the overall gain may go one

10:19 16 way but the individual component gains go another way. That

10:19 17 infringes the claims, and Dr. Larson has shown how that's done.

10:20 18 So unless Your Honor has any questions, that's it for me.

10:20 19 THE COURT: I'm good.

10:20 20 MR. JOHANNINGMEIER: Thank you.

10:20 21 THE COURT: Mr. Cordell?

10:20 22 MR. CORDELL: So if I could begin with the comparing. And

10:20 23 actually, could I keep the plaintiff's slides and could you go

10:20 24 to Slide 44, please?

10:20 25 I can do it on the ELMO. 44? Oh, sorry. Would you

10:20 1 believe 45?

10:20 2 Looks like my slides have a different numbering than --
10:20 3 actually, could I just have the ELMO?

10:21 4 Okay. So counsel showed you two slides that -- mine's 45,
10:21 5 but I think his -- well, I'm not sure what it was. But you'll
10:21 6 recall the algorithm, Your Honor, which I hopefully am just
10:21 7 publishing to Your Honor and the well. And the citation they
10:21 8 give us is to Dr. Larson's report at Paragraph 134.

10:21 9 So I pulled out Paragraph 134. And this is part of the
10:22 10 source code analysis, but this is the entirety of Paragraph 134
10:22 11 from Dr. Larson's report. And there are a couple of important
10:22 12 points here.

10:22 13 Number one, this relates to the '825 patent which does not
10:22 14 have the comparing limitation in it at all, right? So the
10:22 15 claims that I'm analyzing here are the one -- are the comparing
10:22 16 claims, not the '825 at all.

10:22 17 So when we're talking about the '202, and it's -- just to
10:22 18 make sure I have the claim numbers correct -- it's Claim 7 and
10:22 19 13. Those are the ones that have the comparing limitations in
10:22 20 them. So we start from that proposition, that they're
10:22 21 expecting us to go to a different patent on a different issue.

10:22 22 Number two, this Paragraph 134 is analyzing the preamble
10:22 23 of the '825 patent claims. So it's not even -- it's not even
10:23 24 beyond the substance -- or into the substance other than
10:23 25 they're supposed to show some power savings.

10:23 1 So somehow we're supposed to divine from this citation,
10:23 2 which I won't read into the record because it's highly
10:23 3 confidential, but it goes on for, I don't know, 20 characters
10:23 4 lots of underscores and slashes. And yet, I'm supposed to know
10:23 5 that that's where to find the comparing evidence.

10:23 6 Counsel also showed you Slide, what for me is 46, which,
10:23 7 again, has some source code on it. Again, impenetrable source
10:23 8 code. Source code that doesn't -- to normal people would never
10:23 9 tell us that this is -- that this is the comparing limitation.

10:23 10 And here we cite -- they cite Paragraph 728 of
10:23 11 Dr. Larson's report. And, again, with a very long source code
10:23 12 citation. Counsel's correct, there are thousands of source
10:23 13 code files. But my clairvoyant powers aren't good enough to
10:24 14 know that, oh, I should have been looking at this for the
10:24 15 comparing limitation.

10:24 16 So you go to Paragraph 728. And there, again, we're
10:24 17 talking about the '825 patent. We're not talking about the
10:24 18 '202 patent at all. And all it tells us is that there are --
10:24 19 there is firmware that is using certain functions. And that's
10:24 20 it, and that's what I got.

10:24 21 So the reality is there is no evidence here. And counsel
10:24 22 did a valiant -- you know, made a valiant attempt at trying to
10:24 23 point us to where it might be somewhere in the evidentiary
10:24 24 record. That doesn't mean that it's part of the evidentiary
10:24 25 record at trial. So the fact that Dr. Larson relied on a chunk

10:24 1 of source code for some purpose doesn't mean he can rely on it
10:24 2 for this purpose. So there simply is no evidence of that
10:24 3 comparing limitation.

10:24 4 With respect to the worst-case conditions argument, the
10:24 5 reality is they point to G0. They point to G0 over and over
10:24 6 again, that's the gain state they're stuck with. And it's
10:25 7 undisputed that in Gain State 0 you have low desired signal and
10:25 8 low interferer.

10:25 9 Counsel said a couple of times that somehow -- somehow
10:25 10 Samsung determines the value of the interferers and determines
10:25 11 the value of the desired signal. There's no evidence of that
10:25 12 at all. In fact, the evidence shows they just take whatever
10:25 13 comes in and they test to see how much power it carries, and
10:25 14 that's it.

10:25 15 They deal with the noise, they deal with the desired
10:25 16 signal downstream someplace. And that's a result of the
10:25 17 progress of technology. Way back when, maybe they had to do it
10:25 18 the way the patents talk about, but today they just don't. So
10:25 19 there's no evidence of that.

10:25 20 And they can't show you anything where in Gain State 0
10:25 21 you've got a high noise signal interferer, jammer, whatever you
10:25 22 want to call it. And unless they can, they can't survive the
10:25 23 worst-case conditions.

10:25 24 And with respect to the adjusting the bias argument, you
10:26 25 know, again, counsel did a valiant job of trying to go in and

10:26 1 find components where the bias currents are adjusted. But his
10:26 2 expert didn't do it. He didn't do it. And, you know, with
10:26 3 this level of complexity, it's simply not fair for him to stand
10:26 4 in front of a jury and walk them through source code and say,
10:26 5 ha, you know, Element 47 in the path has a bias adjustment,
10:26 6 therefore that somehow qualifies. That's just not the way the
10:26 7 process works.

10:26 8 And even if he could, what he can't show is that coming
10:26 9 off of that worst-case condition where the interferer is high
10:26 10 and the desired signal is low, somehow the bias currents are
10:26 11 decreased. Because it's just the opposite. When we come off
10:26 12 of that high interferer signal, bias current are increased.

10:26 13 And I have to make one comment about the -- an argument
10:26 14 that I heard this morning. Because when we're looking at the
10:26 15 worst case, I heard something new today. But it's indicative
10:26 16 of the problems we're going to have in trial.

10:27 17 You know, the third order intercept. I actually wrote it
10:27 18 down to make sure I got it right. We're going to be looking
10:27 19 for the third order intercept of a signal to know whether it's
10:27 20 low.

10:27 21 And, Your Honor, that's the kind of thing that we just
10:27 22 can't burden the good people of Waco with. I mean, that's
10:27 23 just -- you know, can you imagine what they'll throw at us if
10:27 24 we expect them to make those decisions?

10:27 25 So with that, Your Honor, I'll pass the podium unless

10:27 1 there are any questions.

10:27 2 THE COURT: Counsel, if you would, as directly as
10:27 3 possible, address Mr. Cordell's argument about the fact that
10:27 4 the bias current is actually increased.

10:27 5 And then also if you'll address his concern that the
10:27 6 section of the expert report that you're relying on applied to
10:27 7 a different patent. Both those issues I'd like to --

10:27 8 MR. JOHANNINGMEIER: That one's easy, Your Honor.

10:28 9 I mean, basically the paragraphs that he cites refers --
10:28 10 so he -- Dr. Larson goes through the claims of the '825 patent
10:28 11 first. So he analyzes Claim 3 in extreme depth with going into
10:28 12 all the code. And then when he gets down to the other claims,
10:28 13 in multiple places he says "as I talked about in -- with
10:28 14 respect to Element 3[c] or with Element 3[a]," so it's -- you
10:28 15 know, because it is the same functionality for both patents.

10:28 16 And so when the same element appears, he basically refers
10:28 17 back. So the reference does cross the boundary into his
10:28 18 analysis of the previous patent. But as far as the code and
10:28 19 the chips go, it's the same chips and the same code that he's
10:28 20 analyzing. So it's just a, you know, cross-reference that --
10:28 21 you know, but it's there and it's clear and they can follow it.

10:28 22 There's a lot in his report and there's a lot of documents
10:28 23 and code cited, but we try to make it as clear as possible of
10:28 24 what he was relying on.

10:28 25 The other thing I would point out, with respect to some of

10:28 1 that comparing code, their expert went through it as well. He
10:29 2 went through in-depth, right? And actually, interestingly,
10:29 3 with respect to this comparison stuff, he mentioned the deficit
10:29 4 bias thing that was shown in my Slide 46.

10:29 5 But if you look at his code analysis, he walks through
10:29 6 that same code file, and then he stops talking about it at
10:29 7 Line 1966. But the code that we cited here is like four lines
10:29 8 later. It's -- he literally just walks all the way through the
10:29 9 code until he gets to that part that he doesn't like because
10:29 10 it's got a comparison in it and stops talking about the code.

10:29 11 They had the code. They looked at the code. Their expert
10:29 12 looked at the code. There's no -- you know, Mr. Cordell's
10:29 13 concern with whether or not we can explain this to the good
10:29 14 people of Waco is -- you know, it's on us to do. We're going
10:29 15 to bring in professors and explain this to them in our best
10:29 16 possible way, but this is a summary judgment motion and the
10:29 17 evidence is there.

10:29 18 So now, you asked about the increased bias point for the
10:30 19 '962, Claim 1, I believe. Because I heard him talking about
10:30 20 the -- I'm trying to make sure which one we're talking about,
10:30 21 but with respect to the increased bias for the -- the '962, I
10:30 22 mean, there's examples in there, as I showed you, of that
10:30 23 occurring. The overall -- there's cases where the overall gain
10:30 24 increases but the component gain drops, decreases. So that's
10:30 25 clearly shown.

10:30 1 [REDACTED]

10:30 2 [REDACTED]

10:30 3 [REDACTED]

10:30 4 [REDACTED] It's in the report,

10:30 5 it's in the code.

10:30 6 [REDACTED]

10:30 7 [REDACTED]

10:30 8 [REDACTED]

10:31 9 [REDACTED]

10:31 10 [REDACTED]

10:31 11 [REDACTED]

10:31 12 [REDACTED]

10:31 13 [REDACTED]

10:31 14 [REDACTED]

10:31 15 [REDACTED]

10:31 16 Thanks, Your Honor.

10:31 17 THE COURT: Mr. Cordell, anything else?

10:31 18 MR. CORDELL: Only this, Your Honor. The '825 patent

10:31 19 doesn't have the comparing limitation in it at all. So

10:31 20 there's -- the citations back to the '825 patent don't do us

10:31 21 any good. It's just not there.

10:31 22 THE COURT: A response to that?

10:31 23 MR. JOHANNINGMEIER: Well, the citations are to the

10:31 24 analysis of the device that he did for the other patents. So

10:32 25 he analyzes the device and says, okay, well, this functionality

10:32 1 of the device does X, Y and Z. And then when he gets down to
10:32 2 the comparing step, he refers back. So the analysis is not --
10:32 3 you know, the claim terms are very similar. There is no
10:32 4 comparing step, right? But he does call back to the previous
10:32 5 analysis and the previous code.

10:32 6 So, I mean, that's the citation that he makes. And if you
10:32 7 follow the chain of his citations, you get to these files, you
10:32 8 get to this code. Their expert was able to do it. And this
10:32 9 is, again, a summary judgment motion. So if the question is,
10:32 10 is the evidence weak or hard to follow, that's maybe something
10:32 11 for Mr. Cordell to, you know, cross Dr. Larson on. But there
10:32 12 is a genuine issue in the report about the evidence here.

10:32 13 THE COURT: Mr. Cordell?

10:32 14 MR. CORDELL: Well, what we're talking about here are
10:32 15 broad citations to code. And the question becomes when -- and
10:33 16 I showed you the two paragraphs he relies on. You know, those
10:33 17 broad citations to source code that has, you know, thousands of
10:33 18 lines in it. Analysis for the '825 patent doesn't mention
10:33 19 comparing, so there was no reason for us to then have decided
10:33 20 to look into those files. He seems to suggest that because we
10:33 21 could perhaps figure out the answer, doesn't answer the
10:33 22 fundamental question which is whether or not they put the
10:33 23 evidence in the record. And they didn't. And because they
10:33 24 didn't, they can't survive summary judgment.

10:33 25 THE COURT: Counsel?

10:33 1 MR. JOHANNINGMEIER: What he put in his report was a
10:33 2 citation to the other part of his report where he did the
10:33 3 analysis of the device. So he gave them the citation to
10:33 4 follow. The fact that it's in a different section is
10:33 5 irrelevant. If you go to the paragraphs that he cites, you
10:33 6 find the discussion of the padding algorithm, for instance, and
10:33 7 the citation to the flowchart, and the comparison is there. So
10:34 8 that's what's in his report.

10:34 9 MR. CORDELL: Just to be clear, Your Honor, this, you
10:34 10 know, flowchart is not in his report. That's not the -- that's
10:34 11 an exhibit. That's a document that we would have had to have
10:34 12 dug out in order to have found what they're now telling us is
10:34 13 where the comparison step takes place. There's just no reason
10:34 14 for us to have done that. It's a different patent, it doesn't
10:34 15 have the comparing limitation in it. And the fact that he
10:34 16 cited a chunk of source code somewhere in his report doesn't
10:34 17 answer the question.

10:34 18 MR. JOHANNINGMEIER: Well, Your Honor, I don't want to
10:34 19 keep popping up here, but, I mean, the issue with the report is
10:34 20 that, you know, we have a lot of code. We have a lot of
10:34 21 documents. We cited to them. He can't put all the code in his
10:34 22 report, for one thing. He put in the citations. He put in the
10:35 23 cross-reference.

10:35 24 The issue on summary judgment isn't whether or not they
10:35 25 did or did not follow the citations or whether they chose to

10:35 1 just cross-examine him on Paragraph 212 and say, where is this
10:35 2 in Paragraph 212? Which is what they actually did.

10:35 3 When their expert was looking at this code, he found the
10:35 4 file, he analyzed the file. He went through. He stopped a few
10:35 5 lines before the part where there's a comparison. I think
10:35 6 that -- he clearly did the analysis. He was in the right
10:35 7 files, he could have seen it, he could have responded to it.
10:35 8 He chose not to. When I asked him about it in deposition, he
10:35 9 got pretty cagey. I think we put the answers in the brief.

10:35 10 But this is a case where they were able to figure out how
10:35 11 this works. They didn't like the result, so they tried to do a
10:35 12 where-is-it-in-your-report game in deposition. We've now shown
10:35 13 where the stuff is, and I guess that's the best we can do, Your
10:35 14 Honor. Thanks.

10:35 15 MR. CORDELL: Again, I -- now I'm belaboring it, Your
10:36 16 Honor. The process is supposed to be rational. We're supposed
10:36 17 to have the disclosure. They didn't make the disclosure. I
10:36 18 think I just heard counsel, you know -- I admire his candor.
10:36 19 He said that the expert stopped a few lines before. Well,
10:36 20 okay, he stopped. And the reality is that if the evidence
10:36 21 isn't in there, it's not in there.

10:36 22 MR. JOHANNINGMEIER: Just to clarify, their expert stopped
10:36 23 a few lines before the code. Not ours. Their expert, in his
10:36 24 analysis, stopped right before the code we cited.

10:36 25 I don't have anything else.

10:36 1 MR. CORDELL: Nothing further.

10:36 2 THE COURT: Well, why don't we take a ten-minute recess?
10:36 3 We'll come back and I'll give you my ruling. And then we'll
10:36 4 move on to the next issue.

10:36 5 THE BAILIFF: All rise.

10:36 6 (Recess taken from 10:36 to 10:44.)

10:44 7 THE BAILIFF: All rise.

10:44 8 THE COURT: Thank you. You may be seated.

10:44 9 The Court is going to overrule Samsung's motion of
10:45 10 noninfringement -- motion for summary judgment of
10:45 11 noninfringement.

10:45 12 The next issue up is -- has to do with 102(g) art. I'll
10:45 13 hear from plaintiff.

10:45 14 MR. JOHANNINGMEIER: You've seen a lot of me early in this
10:45 15 one. Get to hear from some other people later.

10:46 16 All right. We'll start on Slide No. 48.

10:46 17 THE COURT: You can -- I'm pretty familiar with 102(g).
10:46 18 You can skip over --

10:46 19 MR. JOHANNINGMEIER: Yeah. Well, I've only got -- it's
10:46 20 actually really short.

10:46 21 So, Your Honor, as you know, 102(g) is a special category
10:46 22 of art. You have to show invention by another. So in order to
10:46 23 show it, you have to show conception, reduction to practice,
10:46 24 lack of concealment.

10:46 25 Dr. Kiaei's report, on Slide 49, actually recited the

10:46 1 constructive reduction to practice standard, and said that you
10:46 2 had to describe the invention with sufficient detail to enable
10:47 3 a person of skill in the art to practice. That's what you have
10:47 4 to do to show constructive reduction to practice in this
10:47 5 context, and there it is in his report. And the problem is, he
10:47 6 didn't do the analysis.

10:47 7 So on the next slide we just have the deposition
10:47 8 testimony. He didn't do it. He didn't analyze the thing from
10:47 9 the point of view of enablement or conception. But we'll just
10:47 10 focus on this one, because this is the clearest failure.

10:47 11 "I do not have specific analysis of that," he says. "I
10:47 12 may not have explicit, direct analysis of that." And then he
10:47 13 attempts to say that it's in these paragraphs, but on the next
10:47 14 slide, on 52, if you look at it, it's not in those paragraphs.

10:47 15 All that he does in his analysis is he basically
10:47 16 identifies the inventors of some Qualcomm patents and says that
10:47 17 the filing of those patents was constructive reduction to
10:48 18 practice, but he never analyzed those patents for whether or
10:48 19 not they showed conception. He never analyzed those patents
10:48 20 for whether or not they showed enabling disclosure to a person
10:48 21 of ordinary skill in the art.

10:48 22 He just basically relied on his invalidity analysis and
10:48 23 said, well, it discloses -- you know, it basically -- it's --
10:48 24 it makes the invention obvious; therefore, it somehow shows
10:48 25 reduction to practice. But obviousness doesn't that. You have

10:48 1 show every element. You have to show it in the mind of the
10:48 2 inventor. You have to show it enabled for constructive
10:48 3 reduction to practice.

10:48 4 And then on concealment, he basically just pointed to the
10:48 5 same thing, pointed to those patents, not all of which have the
10:48 6 disclosure. In fact, you know, he doesn't -- for certain
10:48 7 claims, he doesn't even say that those patents disclose all the
10:48 8 elements. So he doesn't have lack of concealment either for
10:48 9 those claims. Because the '430 patent, you know, if you -- if
10:48 10 he can't even say it anticipates, then how can he say it
10:49 11 discloses the invention, much less anything else?

10:49 12 So this is all they've got in their brief. I won't
10:49 13 belabor the point because it's fairly simple. He didn't do the
10:49 14 analysis that's required to qualify this as prior art;
10:49 15 therefore, it's not prior art.

10:49 16 They can run the '430 patent at trial if they want.
10:49 17 That's a separate patent. But this [REDACTED] project chip
10:49 18 is not qualified as prior art in this case.

10:49 19 And I'll turn it over to counsel.

10:49 20 MR. CORDELL: Your Honor, Mr. Song will be presenting our
10:49 21 argument.

10:49 22 THE COURT: Okay. I think this is the first time I've had
10:49 23 you in my court, isn't it?

10:49 24 MR. SONG: Yes, Your Honor.

10:49 25 THE COURT: Welcome.

10:49 1 MR. SONG: Thank you very much.

10:49 2 Good morning, Your Honor. So Theta, while acknowledging
10:50 3 that the 102(g) art can be used for obviousness, they argue
10:50 4 that it can't qualify as 102(g) art unless it's anticipatory.
10:50 5 This contradicts itself, and it just makes no sense.

10:50 6 This -- let's look at Theta's arguments here. This is
10:50 7 from the reply brief. First, they say: Once qualified as
10:50 8 prior art, Section 102(g) references can be used in obviousness
10:50 9 analysis.

10:50 10 So they acknowledge that the reference itself does not
10:50 11 have to disclose each element of the claim. They say it can be
10:50 12 used in obviousness analysis.

10:50 13 But then they go on to say, okay. What does it take to
10:50 14 qualify?

10:50 15 Qualification as 102(g) art requires a showing of
10:50 16 conception and constructive reduction to practice. Okay.

10:50 17 Then they say: But the conception cannot be corroborated
10:50 18 and constructive reduction to practice cannot be shown in a
10:51 19 reference that only renders certain elements obvious.

10:51 20 So now they say the reference must show every element. It
10:51 21 must be anticipatory. So this is self-contradictory.

10:51 22 According to Theta, any reference to be used for
10:51 23 obviousness, which they acknowledge that it can be used for
10:51 24 obviousness, must also anticipate the claims. That just makes
10:51 25 no sense, Your Honor.

10:51 1 First of all, I want to -- well, so -- and the -- just
10:51 2 wanted to make sure that the entirety of Theta's argument boils
10:51 3 down to that issue. They incorrectly argue that the
10:51 4 [REDACTED] project used in the obvious analysis for certain
10:51 5 claims cannot qualify as 102(g) art because it does not
10:51 6 anticipate. This makes no sense, and Theta is incorrect on the
10:51 7 law.

10:51 8 So before I get into the correct law, I wanted to point
10:52 9 out that Theta's argument applies to only a subset of the
10:52 10 asserted claims. And those are Claim 8 of the '825 patent and
10:52 11 Claim 1 of the '962 patent.

10:52 12 With regard to the other claims, Dr. Kiaei opined that
10:52 13 they're anticipated by the [REDACTED] project. So even under
10:52 14 Theta's wrong test, [REDACTED] is qualified as 102(g) art for
10:52 15 those other claims.

10:52 16 But, in fact, the [REDACTED] project is 102(g) art for
10:52 17 all claims because Theta is wrong on the law. The Tyco case
10:52 18 from the Federal Circuit lays it out. 102(g) art need not
10:52 19 disclose all elements of the claims when used for obviousness.

10:52 20 In Tyco, the conception and reduction to practice analysis
10:52 21 of the Ethicon Prototype -- it was the 102(g) reference
10:52 22 there -- it did not include all the elements. It was
10:53 23 considered under 103. And because of that, ultimately the
10:53 24 Federal Circuit concluded: The district court improperly held
10:53 25 that the Ethicon Prototype could not be considered prior art

10:53 1 under 103, and erred in finding that the Curved Blade Claims
10:53 2 and Dual Claims would not have been obvious.

10:53 3 So, obviously, the prototype did not include the curve --
10:53 4 all the elements for the Curved Blade Claims or the Dual
10:53 5 Claims.

10:53 6 Theta does not address this clear standard laid out in the
10:53 7 Tyco case. And, in fact, Theta cites no case requiring an
10:53 8 anticipation analysis when a 102(g) (2) reference is used for
10:53 9 obviousness under 103.

10:53 10 Samsung, on the other hand, has cited numerous cases, such
10:53 11 as two seminal Federal Circuit cases, Tyco and Sandt, stating
10:53 12 no special all elements disclosure is required for 102(g) art
10:54 13 to be used for obviousness.

10:54 14 The cases that Theta relies on for this, you know, special
10:54 15 requirement that it must be anticipatory, they all involve two
10:54 16 parties determining the priority of invention.

10:54 17 Who was the first to invent?

10:54 18 So of course an inventor seeking to show priority must
10:54 19 show conception of every element. Similarly, an inventor
10:54 20 swearing back of antedating prior art must also show conception
10:54 21 of all elements.

10:54 22 So these are the examples that Theta cites for their
10:54 23 incorrect assertion that 102(g) art must be anticipatory.

10:54 24 And Section 102(g) itself has two distinct sections
10:54 25 addressing these concepts. 102(g) (1) talks about -- it

10:54 1 addresses an interference proceeding and the priority of
10:54 2 invention; 102(g)(2) is the use of -- use of a reference as a
10:54 3 source of prior art whether for anticipation or obviousness
10:55 4 under Section 103.

10:55 5 So here the --
10:55 6 (Off-the-record discussion.)

10:55 7 MR. SONG: Okay. So here are the cases, Your Honor, that
10:55 8 the -- both parties -- both parties cite. On the left are
10:55 9 those cases where you're addressing the priority of invention.
10:55 10 Theta cites, for example, the Frazer case, right? That was an
10:55 11 interference proceeding. And of course both parties are trying
10:55 12 to show priority of inventorship and all elements or of each
10:55 13 "count," as Theta puts it.

10:55 14 Theta also cites the Burroughs case, where they were
10:56 15 trying to determine whether all the listed inventors did, in
10:56 16 fact, conceive of the invention. So of course they were trying
10:56 17 to determine whether the listed inventors conceived of the
10:56 18 entire invention.

10:56 19 Theta also cites the Round Rock case. So there, they're
10:56 20 trying to antedate -- the inventor was trying to antedate a
10:56 21 prior art reference. Of course he's trying to show all
10:56 22 elements were conceived.

10:56 23 Our case is spelled out in Tyco and Sandt, which is 102(g)
10:56 24 art used for obviousness and prior invention. And in that
10:56 25 instance, that can be combined with other references or a

10:56 1 POSITA's knowledge.

10:56 2 Here are the two cases again.

10:56 3 Tyco: It would have been obvious to one of ordinary skill
10:56 4 to replace a straight blade of the Ethicon Prototype with a
10:56 5 curved blade.

10:56 6 In Sandt: The district court correctly concluded that the
10:56 7 use of threaded studs would have been an obvious substitution
10:56 8 for welding...

10:57 9 The Federal Circuit cases that are actually on point talk
10:57 10 about 102(g) art need not disclose all elements when used under
10:57 11 103.

10:57 12 Now, Theta also complains that Samsung did not prove
10:57 13 evidence on conception and reduction to practice. And, again,
10:57 14 their analysis is incorrect in that they're saying Samsung must
10:57 15 show proof on evidence of conception and reduction to practice
10:57 16 on every element. But 102 -- but Samsung is using -- with
10:57 17 regard to certain claims Samsung is using the 102(g) art to
10:57 18 show obviousness.

10:57 19 And with regard to showing obviousness, Dr. Kiaei provided
10:57 20 11 pages on the background of a Qualcomm [REDACTED] project.
10:57 21 He identifies the timeline all based on documents long before
10:58 22 the priority date of the Theta patents. The technology and the
10:58 23 personnel involved, including numerous individuals that
10:58 24 overlapped between the Qualcomm project and the Qualcomm
10:58 25 patents. He has 92 pages of element-by-element analysis for

10:58 1 the Qualcomm [REDACTED] project which shows conception,
10:58 2 anticipation and obviousness.

10:58 3 And he has further 114 pages element-by-element analysis
10:58 4 of the '430 patent which shows the reduction to practice.
10:58 5 Samsung submits that the '430 patent and '602 patent and the
10:58 6 '279 Qualcomm patents show reduction to practice of the
10:58 7 Qualcomm [REDACTED] project. Dr. Kiaei's report is more than
10:58 8 sufficient to show conception and reduction to practice.

10:58 9 And it doesn't seem like plaintiffs are really focusing on
10:59 10 abandonment, suppression to conceal. But I won't get into
10:59 11 these slides, Your Honor, but of course Qualcomm disclosed this
10:59 12 invention and they did not abandon, suppress or conceal.

10:59 13 With that I'll pass it to plaintiff.

10:59 14 MR. JOHANNINGMEIER: Just briefly, Your Honor.

10:59 15 So counsel cited a bunch of cases about whether or not --
10:59 16 and there are a bunch of cases about whether or not 102(g) art
10:59 17 could be used for obviousness in the ultimate liability
10:59 18 analysis. And we actually don't disagree on that. Those cases
10:59 19 say that it can.

10:59 20 But even the Tyco case, and we pointed this out in our
10:59 21 reply brief at Page 3. In that case the reference was
10:59 22 qualified through a prior showing of -- or a showing of prior
11:00 23 conception and later diligent reduction to practice.

11:00 24 There's a threshold issue with 102(g). You don't get to
11:00 25 use it for anticipation or obviousness if you don't show the

11:00 1 statutory requirements of 102(g) of invention, conception and
11:00 2 reduction to practice. So that's what we are saying is not met
11:00 3 here.

11:00 4 We're not saying that [REDACTED] couldn't be used. The
11:00 5 issue with 102(g) is that it's secret art, right? So no one
11:00 6 knows about it, and that's why the statute has these additional
11:00 7 requirements of conception, reduction to practice and lack of
11:00 8 concealment. And so they haven't done that analysis, most
11:00 9 obviously, with respect to reduction to practice. Because as
11:00 10 counsel said, he never mentioned an enablement analysis. There
11:00 11 is no enablement analysis in the briefs. It's just not there.
11:00 12 And their expert admits it's not there.

11:00 13 So they cannot show, just by saying, well, look, here's a
11:00 14 patent that has, you know, its own invention in it. They can't
11:00 15 show conception and reduction to practice of Dr. Tsividis'
11:00 16 invention by those inventors before in that patent. They
11:01 17 haven't done it.

11:01 18 And so that's the whole beginning and end of this issue.
11:01 19 This art isn't qualified as prior art, so whether or not it can
11:01 20 be used is -- well, it can't be used because it's not qualified
11:01 21 under 102(g).

11:01 22 So thank you, Your Honor.

11:01 23 THE COURT: Court's going to overrule the motion.

11:01 24 I think this would be a good time also -- I may have told
11:01 25 you all this, I can't remember who I have and who I haven't,

11:01 1 but if I haven't explained to you when you're at trial how I
11:01 2 expect you all to put on your experts.

11:01 3 Let's say that, to pick on Mr. Cordell, he has a witness
11:01 4 on the stand, an expert -- this is just experts -- and he draws
11:01 5 an objection that there's something that he's asking that is
11:01 6 outside of the expert report.

11:01 7 I expect in Mr. Cordell's outline for him to have already
11:01 8 put down wherever it is in the report that that is tethered to.
11:01 9 And so I expect the lawyer who's on direct to say, Judge, it
11:02 10 is. It's on Page 32 in Paragraph X.

11:02 11 Now, it doesn't, you know, verbatim. I'm just saying, you
11:02 12 have to be able to persuade me that you have disclosed to the
11:02 13 other side what you're asking in the report or it was clear
11:02 14 from the report that's what he was going to be asked.

11:02 15 The only problem we get into is, you all are really good
11:02 16 lawyers, which means on cross you're going to do a good job on
11:02 17 cross, which means occasionally there's something an expert has
11:02 18 to get into on redirect that may or may not be in his direct to
11:02 19 deal with something that was unanticipated that was brought up
11:02 20 on cross.

11:02 21 I'm more flexible on what an expert says on redirect if I
11:02 22 am persuaded by a lawyer that it was something that the expert
11:02 23 is responding to rather than giving an affirmative opinion to.

11:03 24 And so that's, generally speaking, the way I handle when
11:03 25 experts are on the witness stand, is I want the person who

11:03 1 asked the questions to very quickly be able to tell me in good
11:03 2 faith where it is in the report so we can keep going quickly.

11:03 3 And also, it -- after one or two times, it discourages the
11:03 4 other side from making those objections.

11:03 5 The next issue we have up is the motions. I think we can
11:03 6 take up both no direct infringement and no willfulness at the
11:03 7 same time, or we can do them one at a time, whichever Samsung's
11:03 8 counsel think -- I think I can follow both arguments. But if
11:03 9 you'd rather do them one at a time, that's fine too.

11:03 10 MR. CORDELL: And, Your Honor, these are arguments that
11:03 11 Dr. Albert is handling. He's our remote lawyer.

11:03 12 THE COURT: Is he available remotely?

11:03 13 MR. ALBERT: I am, Your Honor.

11:03 14 THE COURT: I'm happy to hear -- let me just -- if you'll
11:03 15 introduce yourself, I just want to make sure my court reporter
11:04 16 can hear you and we can make sure we can transcribe.

11:04 17 So if you'd introduce yourself, let me make sure Kristie
11:04 18 can hear you and then you can go ahead and proceed with your
11:04 19 argument.

11:04 20 MR. ALBERT: Good morning.

11:04 21 (Off-the-record discussion.)

11:04 22 THE COURT: So let's do this. We can hopefully get that
11:04 23 addressed at lunch. Why don't we skip over this issue, we'll
11:04 24 get it -- we're going to do what we can to get this fixed over
11:04 25 lunch so that Kristie can hear it better. And so let's move on

11:04 1 then to -- we have an hour.

11:04 2 So let's take up the issue of the certificate of
11:04 3 correction.

11:04 4 MR. CORDELL: And for us that'll be Mr. Song again.

11:04 5 THE COURT: Okay. Very good.

11:06 6 I'm -- we're -- I've been pretty fully briefed on this. I
11:06 7 think I can jump to the plaintiff first and have -- I
11:06 8 understand your argument, and I'm certainly going to give you a
11:07 9 chance to respond after I hear them, but I have a pretty good
11:07 10 idea of what you're going to say. And to save a little time,
11:07 11 let me start with the plaintiff and do it that way.

11:07 12 MR. SONG: Very well, Your Honor.

11:07 13 THE COURT: Thank you.

11:07 14 MR. JOHANNINGMEIER: You skipped the one that wasn't me.
11:07 15 So it's me again.

11:07 16 THE COURT: Well, not to put too fine a point on this, but
11:07 17 it's probably not a great thing for you that I'm asking you to
11:07 18 go first.

11:07 19 MR. JOHANNINGMEIER: I understand. I understand.

11:07 20 THE COURT: And I want to take up -- I don't want to take
11:07 21 up the damage. I want to take up whether or not the -- it was
11:07 22 the -- it was correctable, and then what happens with the
11:08 23 damages will flow from that. I don't want to hear about the
11:08 24 damages first.

11:08 25 MR. JOHANNINGMEIER: Right. Right. Yes, Your Honor.

11:08 1 So the question here is -- can we just go to the next
11:08 2 slide?

11:08 3 So we have the brief on no damages. We have our brief on
11:08 4 judicial correction, which would moot theirs by making it
11:08 5 retroactive. The question is: The Court, you know, can
11:08 6 correct this if it's evident from the face of the patent, but
11:08 7 that's ultimately the question on both the -- you know, the
11:08 8 propriety of the correction and the judicial correction.

11:08 9 So the unamended claim contradicts itself and the
11:08 10 specification. In the specification, in every discussion, in
11:08 11 all of these figures it talks about the bias current being
11:08 12 lowered and reduced, and the uncorrected claim said that it was
11:08 13 increased.

11:08 14 So simply looking -- a person of ordinary skill looking at
11:09 15 that thing would say, you know, would the testimony reveal --
11:09 16 it wouldn't be consistent on the terms of the claim itself
11:09 17 because it doesn't make sense. It says that you want to -- it
11:09 18 basically describes a situation where you want to reduce the
11:09 19 bias current, but the claim said to increase it. Basically it
11:09 20 said use more power when you're in the best -- in the good
11:09 21 condition.

11:09 22 And that doesn't make any sense to a person of ordinary
11:09 23 skill reading this, as the testimony from everybody suggested.
11:09 24 But then if that person of ordinary skill was to read the
11:09 25 specification, they would find all of the references to mean

11:09 1 that it was lowered. So they would understand that the
11:09 2 claim -- the patent actually was teaching that it should be
11:09 3 lowered in that circumstance.

11:09 4 Now, there's a lot of discussion in the briefing about
11:09 5 whether or not this kind of thing is correctable. And we have
11:10 6 a case showing minor corrections that are correctable. We've
11:10 7 had -- put in cases showing things where the -- where stuff was
11:10 8 corrected from the opposite to itself.

11:10 9 And the bottom line is that the cases say that if the --
11:10 10 well, they say that if it was evident from the face of the
11:10 11 patent, the Court can correct it. But in terms of correction,
11:10 12 the cases say that when you're conforming -- when you're making
11:10 13 a correction that simply conforms the claim to what the
11:10 14 specification says that that's not a broadening correction.
11:10 15 And those -- you know, there's multiple examples of that in our
11:10 16 brief, including ones that are about minor corrections.

11:10 17 So the --

11:10 18 THE COURT: Help me out. I didn't understand this -- the
11:10 19 argument that this was broadening. I think the defendant's
11:10 20 concern is that this would be rewriting the patent. I don't --
11:11 21 am I wrong about that from Samsung's perspective?

11:11 22 MR. SONG: Yes, Your Honor. I mean, they are essentially
11:11 23 rewriting the patent. Case law says broaden. But any change
11:11 24 that covers things that didn't cover before, that, by
11:11 25 definition, is broadening.

11:11 1 THE COURT: Got it. In that sense, but, yeah. We're
11:11 2 saying the same thing. I got it.

11:11 3 MR. JOHANNINGMEIER: Well, but we -- I mean, we disagree
11:11 4 with that -- with what Mr. Song just said, that any change that
11:11 5 changes the scope would be broadening. That -- if that was the
11:11 6 rule, there could never be a correction. Someone would argue
11:11 7 that it changes the scope.

11:11 8 So the cases we laid out in our brief show changes that --
11:11 9 changing things from plus or minus in a formula, things like
11:11 10 that that do change the scope. And yet they're valid
11:11 11 corrections, right? And the cases say, well, that's because
11:11 12 the -- you're conforming -- you're not changing the scope.
11:11 13 You're conforming the scope to what was intended, to what's
11:11 14 disclosed, to what a person of ordinary skill would understand.

11:12 15 So in the situation where a person of ordinary skill would
11:12 16 look at this and say, whoa, that can't be right, and look at
11:12 17 the patent and say, that's not right. Then you are not
11:12 18 changing the scope of the claim from what a person of ordinary
11:12 19 skill would understand. You're just conforming it to what they
11:12 20 would understand.

11:12 21 And there's multiple cases that say that, including ones
11:12 22 after the -- that they rely on. I believe the -- well, if I
11:12 23 can pull up -- I don't have the brief in front of me, but
11:12 24 they're all in our brief.

11:12 25 So that fundamentally is the dispute, is whether or not

11:12 1 you can make a change that corrects the patent to what a person
11:12 2 of ordinary skill would understand. And then, you know, is
11:12 3 that changing the scope? Well, no, because -- it's not
11:12 4 changing the scope. Because the scope is what a person of
11:12 5 ordinary skill would understand. If they understand it's
11:12 6 broken, then you're not changing the scope by making the
11:12 7 correction.

11:12 8 And so there's multiple opinions laying that out,
11:13 9 including with respect to minor corrections as opposed to just
11:13 10 typos. And then, you know, so those are in our brief and we
11:13 11 believe that this is proper based on that.

11:13 12 We think this is a perfect example of one where, you know,
11:13 13 the claim says save power by increasing the power. It doesn't
11:13 14 make sense. So a person reading that would be like --
11:13 15 would look to the spec and see lowered, reduced, reduced. They
11:13 16 would understand that what was taught in the specification
11:13 17 wasn't captured in the claims. And they would understand that
11:13 18 this was what was intended.

11:13 19 And in that situation there's plenty of authority for
11:13 20 corrections being proper. And if Your Honor believes that the
11:13 21 error is -- would be evident, then there's also authority for
11:13 22 correcting -- judicially correcting the claims to just make
11:13 23 that -- basically do what the PTO did. I mean, the PTO looked
11:13 24 at this. They issued a correction. Corrections are presumed
11:14 25 valid. All of that we have in our briefs as well.

11:14 1 What we're asking the Court to do is to correct the claim
11:14 2 consistent with what the PTO did. And the reason for that is
11:14 3 very obvious from the brief, because it makes the damages
11:14 4 retroactive.

11:14 5 But the important thing here is that there are cases that
11:14 6 lay it out. You can correct this when you're just conforming
11:14 7 the claim to what's disclosed to a person of ordinary skill and
11:14 8 what a person of ordinary skill would understand.

11:14 9 So I think that's it in a nutshell, Your Honor.

11:14 10 THE COURT: Got it. Give me a second.

11:14 11 (Off-the-record bench conference.)

11:16 12 THE COURT: So the Court finds that the certificate of
11:17 13 correction is invalid. The Court is not going to judicially
11:17 14 correct it. It's going to deny the motion for judicial
11:17 15 correction.

11:17 16 Now, what I don't know is what that does to the
11:17 17 plaintiff's case because the plaintiff has a patent that was
11:17 18 extant before the correction, but I'm assuming the plaintiff
11:17 19 would not be asserting that patent with that claim in it
11:17 20 against the defendant. But I'm not sure.

11:17 21 So I know I sound ignorant, but I'm just -- I'm not sure
11:17 22 what -- I'm not sure what to do with that -- what we're going
11:17 23 to do with that patent in this trial, given what I've done with
11:17 24 regard to the certificate of correction and the issue of
11:17 25 correction.

11:17 1 MR. CORDELL: So I don't think the plaintiff has asserted
11:17 2 the uncorrected version at all.

11:18 3 MR. SONG: Your Honor, the uncorrected claim they've, in
11:18 4 fact, said that it's nonsensical. It's against Ohm's law.
11:18 5 They have not asserted any opinions on it. So there's nothing
11:18 6 in the record on the uncorrect one.

11:18 7 MR. JOHANNINGMEIER: Your Honor, just briefly, the
11:18 8 situation is that if the damages -- we've basically conceded
11:18 9 that the damages would not be retroactive. So it would be from
11:18 10 the point of view of the correction, which makes this no longer
11:18 11 the first patent in the case.

11:18 12 It is asserted forward from the correction, but we
11:18 13 obviously need to discuss and decide what we're going to do
11:18 14 with respect to whether or not we're going to run with it at
11:18 15 trial.

11:18 16 MR. CORDELL: I believe, as a legal matter, Your Honor,
11:18 17 your finding that the correction is invalid invalidates the
11:18 18 patent. So I don't think there is a take --

11:18 19 THE COURT: That, I don't know. But if that's true,
11:18 20 then -- I don't remember that in the briefing, that my finding
11:18 21 invalidates the patent, and I guess that's where I'm showing my
11:18 22 ignorance, is I know what I've done. I understand what I've
11:19 23 done in terms of I don't believe the Patent Office was correct
11:19 24 and I don't believe it should have been corrected, but I don't
11:19 25 know the law on the impact on a patent that has improperly been

11:19 1 corrected.

11:19 2 MR. BLACK: The answer is, Your Honor, the uncorrected
11:19 3 patent might have been assertable. However --

11:19 4 THE COURT: That was what makes sense to me.

11:19 5 MR. BLACK: First of all, they did not present an
11:19 6 infringement case based on the uncorrected patent; and second
11:19 7 of all, they've stated repeatedly, as a matter of law, judicial
11:19 8 estoppel at this point actually, that there's no support in the
11:19 9 original specification for the uncorrected claim. They went so
11:19 10 far as to say it violated Ohm's law.

11:19 11 So there can be nothing in this case from an infringement
11:19 12 perspective because they don't have a report on the uncorrected
11:19 13 analysis; and if they did, it would be invalid under
11:19 14 Section 112 because there's no support for the claims.

11:19 15 So the patent is out of the case. It's not a matter of
11:19 16 whether or not the infringement date, the start date, the '962
11:20 17 is out, which will have other ramifications for the rest of the
11:20 18 day.

11:20 19 THE COURT: That is what makes sense to me.

11:20 20 MS. DE MORY: Yeah. I don't think -- I mean, we didn't
11:20 21 assert the uncorrected patent, and I believe Your Honor is
11:20 22 finding the patent to be invalid essentially by the
11:20 23 correction --

11:20 24 THE COURT: I'm finding the correction to be invalid. But
11:20 25 not having dealt with this before, I don't know -- and I should

11:20 1 have thought of this before I came out here. I just don't know
11:20 2 if that means that the patent is invalid and can't -- and I
11:20 3 understand what Mr. Black is saying, which -- and it makes
11:20 4 eminently good sense to me, especially given what the plaintiff
11:20 5 had to do to attempt to get it corrected, which is to say it
11:20 6 only makes sense -- it is -- the proof of it needing to be
11:20 7 corrected is what's in the specification doesn't...

11:20 8 So I'm going to invalidate the patent --

11:20 9 MR. BLACK: Thank you, Your Honor.

11:20 10 THE COURT: -- which I guess is the cleanest way to do it.
11:20 11 And then it's Samsung's problem if I'm wrong, but I think
11:21 12 that's -- I think it's the right thing to do, based on my
11:21 13 decision, is to formally -- not ask the plaintiff to withdraw
11:21 14 it and deal with a failure to do an expert report and all that
11:21 15 stuff.

11:21 16 I'm just going to find as a matter of law it's invalid
11:21 17 based on my decision with regard to the correction, and that's
11:21 18 what the plaintiff can take up if they think I'm wrong.

11:21 19 MR. CORDELL: Thank you, Your Honor.

11:21 20 MS. DE MORY: Thank you, Your Honor.

11:21 21 THE COURT: Okay. So next we have a Daubert regarding --
11:21 22 is it Dr. Steckel?

11:21 23 MR. HAND: Yes, Your Honor.

11:21 24 THE COURT: Okay. I'm happy to take that up.

11:21 25 MR. CORDELL: Your Honor, Mike McKeon will handle that for

11:21 1 Samsung.

11:21 2 MR. HAND: Aaron Hand for the plaintiff, Your Honor.

11:21 3 THE COURT: Yes, sir.

11:21 4 MR. HAND: I will do my best to keep this brief.

11:21 5 Incredibly in this case, Dr. Steckel admitted in his deposition
11:22 6 that he had not deciphered the very analysis that he was hired
11:22 7 to rebut before the report bearing his name was tendered. He
11:22 8 didn't figure out until Samsung's counsel told him on redirect
11:22 9 what had happened in the report that he himself was supposed to
11:22 10 have analyzed. Therefore, the opinions that are expressed in
11:22 11 Dr. Steckel's report are not reliable, and there's no way they
11:22 12 can possibly be tied to the specific facts of this case.

11:22 13 This goes beyond something that's a mere cross point, this
11:22 14 is a methodological failure on the part of Dr. Steckel.
11:22 15 Because having not actually understood or analyzed or read or
11:22 16 deciphered the report that he was supposed to rebut, there's no
11:22 17 way that what the words that are in his rebuttal report are any
11:22 18 way tied to the facts of this case, the facts of Dr. Prince's
11:22 19 report, the facts that he was hired to rebut.

11:22 20 And it goes beyond that, because the report that he
11:23 21 tendered is really nothing more than a generic recitation of
11:23 22 articles that are not actually tied to what happened in this
11:23 23 case. And he did nothing himself to go beyond generic to
11:23 24 actually look at any facts in this case. He didn't talk to a
11:23 25 single Samsung person. He didn't talk to a single one of

11:23 1 Samsung's other experts. He didn't look at a single deposition
11:23 2 transcript. He didn't look at any rog responses. He didn't
11:23 3 interview anybody in the industry. He didn't conduct any focus
11:23 4 groups. He didn't review any production documents of his own.

11:23 5 And this is a list of things that one of his footnotes
11:23 6 says is all things that you should be doing if you're trying to
11:23 7 assess whether or not a survey is valid or whether or not a
11:23 8 survey looked at the right factors.

11:23 9 So exclusion under Daubert is warranted here. There's
11:23 10 simply too great of an analytical gap between the data that he
11:24 11 didn't look at and he didn't analyze and the opinions that are
11:24 12 in his report. And that comes from the GE versus Joyner case
11:24 13 from the Supreme Court. I'll keep it simple.

11:24 14 THE COURT: Mr. McKeon? Welcome. I haven't seen you in
11:24 15 over a decade. Good to see you.

11:24 16 MR. MCKEON: Good morning, Your Honor. It's a pleasure to
11:24 17 appear before you. It really is.

11:24 18 So if I can get the slides up here, please. All right.

11:24 19 Well, so good morning, Your Honor. So the issue here is
11:24 20 Dr. Steckel, really the basis of his opinions, of course, are
11:24 21 in his report. And what we know about Dr. Steckel is that he
11:24 22 really is a premier expert on the issue of surveys and conjoint
11:24 23 analysis. And, in fact, he has over 40 years of survey
11:24 24 experience and conjoint analysis. And that's the primary
11:25 25 opinion he offers in his report, is critiquing the conjoint

11:25 1 survey that their expert, Dr. Prince, put on.

11:25 2 And the basis, really, of their motion papers and the
11:25 3 argument I heard this morning really is, there was an issue
11:25 4 about his experience related to economics. Because what you're
11:25 5 going to hear with respect to Dr. Prince's challenge that we
11:25 6 have in our motion papers is that he takes the survey and then
11:25 7 he does a second step and does a microeconomic analysis. And
11:25 8 we have a big problem with his two-step process.

11:25 9 The bulk of the report that Dr. Steckel put in related to
11:25 10 the survey. And he also, as part of that analysis, made some
11:25 11 observations about the microeconomic analysis. But that was
11:25 12 secondary to his main focus which is survey. And certainly he
11:25 13 has experience in survey and they don't really, I think, in any
11:26 14 meaningful way, counter that.

11:26 15 And even with respect to economics, he has a degree from
11:26 16 Wharton School, an M.B.A., that deals with economics as well.
11:26 17 So his experience is there.

11:26 18 But let me talk about the deposition testimony that they
11:26 19 cited, and that seems to be the focus of their argument this
11:26 20 morning.

11:26 21 During the report -- in the report process, we have on the
11:26 22 right an excerpt from his report. He commented on an excerpt
11:26 23 from Dr. Prince's report.

11:26 24 And this is, on the left, is from Dr. Prince. And
11:26 25 Dr. Prince makes his observation that based on this willingness

11:26 1 to pay, which is the result of the survey, consumers are going
11:26 2 to pay \$4.74 more per unit. And then he takes that and tries
11:26 3 to create a -- he calls it an equilibrium price, which is
11:26 4 market price that a consumer would pay for this additional
11:26 5 20 minutes of battery life on an already existing 13-hour
11:27 6 battery. And he says that price is going to be \$2.37.

11:27 7 Then he goes on and does this micro -- further
11:27 8 microeconomic analysis and concludes that the profit that
11:27 9 Samsung would make per unit, based on the \$2.37 additional
11:27 10 price, is \$4.72.

11:27 11 And that's the head-scratcher. Because, well, wait a
11:27 12 minute. The price is only going up -- the same phone,
11:27 13 nothing's changed, and the price is only going up \$2.37, but
11:27 14 yet Samsung's going to have the profit go up to \$4.72.

11:27 15 And in his report, that's all he mentions, you know, on
11:27 16 the right. He goes, well, that's kind of a head-scratcher,
11:27 17 doesn't make sense to me.

11:27 18 And that was the point he made. And then in deposition,
11:27 19 they went on further about, well, what about Prince's analysis
11:27 20 and the \$4.72, do you know how he would calculated it?

11:27 21 That wasn't the focus of his critique. He was just making
11:27 22 the high-level point that it doesn't make sense where you're
11:28 23 going to have -- the costs are the same, the same product and
11:28 24 also your profits are almost going to double for the \$2.37
11:28 25 price increase.

11:28 1 That was the point he was making in his report. And in
11:28 2 the deposition, they went off on, what's the basis for
11:28 3 Dr. Prince's analysis? He wasn't going into that, and that was
11:28 4 the excerpt and the confusion in the deposition.

11:28 5 But what he did do -- and it's the core of his report and
11:28 6 what he -- he's going to testify at trial, will be his trial
11:28 7 testimony is the problems with the survey.

11:28 8 And Dr. Prince's survey is really problematic, Your Honor.
11:28 9 And I won't go into the details of his numbers, but there's two
11:28 10 ways to look internal validity of a survey and a conjoint
11:28 11 survey.

11:28 12 And, you know, hit rate is how well the model of the
11:28 13 survey, how well that predicts a given respondent's result.
11:29 14 And the literature says, oh, you've got to be 70, 80 percent.
11:29 15 At the time, it should predict it. And the hit rate here that
11:29 16 was calculated by Dr. Steckel was 44 percent.

11:29 17 And U-Squared is how well that the data fits the model.
11:29 18 One is random -- I'm sorry. Zero's random. One is perfect
11:29 19 fit.

11:29 20 This survey by Dr. Prince is close to random. And this
11:29 21 analysis is laid out in the report. That is the bulk of his
11:29 22 opinion that's going to be at trial? And this is Steckel's
11:29 23 bailiwick. This is his area. And this is the basis of his
11:29 24 opinion.

11:29 25 And there's other things they didn't mention this morning,

11:29 1 so I won't go into it, Your Honor. But in their briefing they
11:29 2 go off about some of the survey issues. We've got responses to
11:29 3 all those. I'm not going to go through it this morning. But
11:29 4 just to say that when it comes to the conjoint survey,
11:29 5 Dr. Steckel is, you know, is a conjoint survey stud, if I may,
11:29 6 and the microeconomic analysis that he's done in responding to
11:30 7 Dr. Prince, very narrow and certainly consistent with the case
11:30 8 law.

11:30 9 And the Fifth Circuit that says, areas adjacent -- and we
11:30 10 cite the case here from the Fifth Circuit on Slide 2 -- areas
11:30 11 adjacent to the core expertise of an expert are fine. And we
11:30 12 have the Abbott case from Delaware we cite that even actually,
11:30 13 ironically, quotes, an expert in the area of marketing, they're
11:30 14 certainly able to testify related areas such as economics.

11:30 15 And that's from Judge Jordan who was on the bench at the
11:30 16 time in Delaware.

11:30 17 So unless there's any questions, Your Honor, that's the
11:30 18 only response I have.

11:30 19 THE COURT: A response?

11:30 20 MR. MCKEON: Thank you.

11:30 21 THE COURT: You're welcome.

11:30 22 MR. HAND: Yes. Briefly, Your Honor.

11:30 23 We're talking about an expert that was hired exactly two
11:30 24 weeks before he tendered his report. And although counsel
11:31 25 wants to say that this was just some sort of observatory

11:31 1 remark, that something didn't seem to make sense that you had a
11:31 2 \$2 number, that how could that possibly -- how could you have a
11:31 3 \$4 number higher than this \$2 number?

11:31 4 The problem is that Dr. Steckel, in that concluding
11:31 5 paragraph, demonstrates that he really didn't understand the
11:31 6 analysis that Prince did. And what's even more problematic,
11:31 7 Your Honor, is he didn't understand the whole purpose for which
11:31 8 the survey was being used.

11:31 9 He didn't understand -- Dr. Steckel did not take the time
11:31 10 or didn't understand that the survey was being used and
11:31 11 designed for an intended purpose. And that intended purpose
11:31 12 was being fed into this economic model, and that there was an
11:31 13 analysis that came around it. He didn't understand any of
11:31 14 that.

11:31 15 Whether it's because he didn't have the understanding or
11:31 16 the background or whether it's because he didn't take the time
11:31 17 to do it, his report and the deposition demonstrate that he did
11:32 18 not do the work that was necessary to be done in order to tie
11:32 19 his opinions to this case and render an opinion that is in line
11:32 20 with Rule 702. And his opinion should be excluded.

11:32 21 Thank you, Your Honor.

11:32 22 THE COURT: You're welcome. I'm going to overrule the
11:32 23 Daubert motion.

11:32 24 The next motion we have up is Samsung's Daubert to
11:32 25 exclude -- is it Dr. Prince?

11:32 1 MR. MCKEON: All right. Well, let's -- if I can get the
11:32 2 slides up here. Okay. Well, let me just start, Your Honor, as
11:33 3 I -- while the slides are being pulled up here.

11:33 4 As I indicated earlier, Dr. Prince, the analysis that he
11:33 5 undertook was a two-step analysis. Do the survey, his conjoint
11:33 6 survey. And the goal of the survey -- it's got one goal -- is
11:33 7 to get what's referred to as a willingness to pay. What are
11:33 8 consumers willing to pay, based on the survey, for an
11:33 9 additional 20 minutes of battery life over the 13 hours already
11:33 10 in the battery? And he does the survey and he gets to \$4.74.

11:33 11 Then he takes the second step. And he refers to it as the
11:33 12 microeconomic analysis. And the goal here -- he needs to do
11:33 13 this because he needs to get an actual market price driven by
11:33 14 supply/demand concepts. And what he does is he gets to \$2.37.
11:34 15 And from there gets a profit, an equilibrium profit of \$4.72.

11:34 16 So what's the problem here? The problem is, Your Honor,
11:34 17 under Daubert, as we all know Daubert is very precise what you
11:34 18 need to do here. First of all you're going to offer a theory
11:34 19 and present it to a jury, it's got to be generally accepted in
11:34 20 the scientific community. We all know that.

11:34 21 And then moreover, you've got to demonstrate that it's
11:34 22 peer-reviewed, this theory, and there's publications. If it's
11:34 23 some kind of new far-flung theory, we better demonstrate that
11:34 24 others out there in your community have written about it,
11:34 25 peer-reviewed about it and approve of it.

11:34 1 And, finally, if there's any potential error rate or an
11:34 2 error rate that you can demonstrate in the analysis that's
11:34 3 unacceptable, then that needs to be considered in your job as a
11:34 4 gatekeeper here. And he just utterly fails at this. And why
11:35 5 is this?

11:35 6 It's because there's nothing out there in the scientific
11:35 7 community, Your Honor, where you combine the conjoint survey
11:35 8 and then take the additional step of doing a microeconomic
11:35 9 analysis to get at what he refers to as an equilibrium price,
11:35 10 and that's the fundamental problem.

11:35 11 And let me just comment quickly on the survey. This is an
11:35 12 example, Your Honor, of one of the questions that a respondent
11:35 13 is asked. It's on the slide here. You pick four potential
11:35 14 phones, and these are all random phones with the brand for
11:35 15 Samsung, LG, Apple, Motorola; a selection in the battery life,
11:35 16 which is notable, it's 6 hours, 12 hours, 24 hours, 18 hours.

11:35 17 And remember, Your Honor, we're talking about willingness
11:35 18 to pay for 20 minutes, and yet he has these really unrelated
11:35 19 segments of hours.

11:35 20 And then really for this motion fundamentally the problem
11:36 21 is, there is no choice of none of the above. So the
11:36 22 respondents have to pick one of these four. You can't --
11:36 23 there's no choice just to opt out of this. You've got to pick
11:36 24 one. And that's a problem.

11:36 25 And then let's talk about the microeconomic analysis. He

11:36 1 takes that and goes into the microeconomic analysis we see here
11:36 2 in which he creates a demand curve, a demand curve, and he
11:36 3 adjusts it down based on willing to pay values and he generates
11:36 4 the numbers that we've talked about.

11:36 5 And there's nothing in the literature, Your Honor. We
11:36 6 asked them to identify it. In their motion papers, they simply
11:36 7 don't do it. The best they come to is the Allenby, which we
11:36 8 have here on the slide in the left, and the Allenby paper is
11:36 9 very specific.

11:36 10 I'll quote from it: While demand parameters can, in
11:36 11 principle, be measured from a conjoint study conducted without
11:37 12 the outside option -- "outside option" here means without the
11:37 13 none of the above -- valid equilibrium calculations do require
11:37 14 an outside alternative.

11:37 15 What does that mean?

11:37 16 Equilibrium price. If your goal is to do this analysis --
11:37 17 to use a conjoint survey to get to the equilibrium price, you
11:37 18 have to have the outside alternative, which is the none of the
11:37 19 above. So even the best they do is the Allenby paper. That
11:37 20 paper itself demonstrates, if you're going to do this, you've
11:37 21 got to have none of the above.

11:37 22 And, Your Honor, it's really intuitive. Because if I have
11:37 23 a phone -- and we have an example in our brief that they
11:37 24 criticize, but I think it demonstrates the point. If I have a
11:37 25 phone that's, you know, \$1 million for 6 hours of battery life

11:37 1 and \$2 million for 12 hours of battery life, well -- and I
11:38 2 can't -- the survey says the respondent can't say none, well,
11:38 3 any result I get from that survey is garbage on its face
11:38 4 because of course no one's going to buy that. And that's
11:38 5 really the point here.

11:38 6 And we went through the brief, Your Honor. And as far as
11:38 7 we can tell, the sources they cite for this proposition that I
11:38 8 can combine the conjoint survey and the microeconomic analysis
11:38 9 to get to the equilibrium price -- we have it on the slide --
11:38 10 the paper we cite -- that they cite deals with market shares,
11:38 11 not equilibrium price. They cite testimony from Professor
11:38 12 Hauser from the Apple/Samsung case. You know, query whether
11:38 13 that's a valid, you know, consideration in Daubert. But
11:38 14 nevertheless, it didn't deal with equilibrium price changes
11:38 15 which is really the key here.

11:38 16 And the other sources are from Dr. -- from Dr. Prince, the
11:38 17 focus group, of course, you know, is not a signal of generally
11:39 18 accepted principles and not a peer-reviewed publication. And
11:39 19 they did offer the Apple/Qualcomm, though he didn't really give
11:39 20 us any evidence in what he was saying there.

11:39 21 And then finally, Your Honor, so that's the problem -- the
11:39 22 Daubert problem with not generally accepted in the scientific
11:39 23 community, not peer-reviewed. Hopefully when they come up
11:39 24 here, they can show you, but we haven't seen it yet.

11:39 25 Then the third problem is the error rate. And I touched

11:39 1 upon this earlier and I won't belabor the point, but the error
11:39 2 rates that are in evidence in this case in terms of what we're
11:39 3 going to present to the jury if this goes forward, right here,
11:39 4 a 44 percent hit rate, that's -- you're batting, that's an F.
11:39 5 Because you got to get 70 to 80 percent, the literature tells
11:39 6 you, 55 percent of the time the survey is predicting in the
11:39 7 wrong result. And the data -- the U-squared tells you it's
11:40 8 close to random.

11:40 9 And this is an internal validity study. Now, there was
11:40 10 the survey itself from an internal design is problematic. Now,
11:40 11 in the brief they go off about external design, and we have a
11:40 12 problem with what Dr. Prince did there. But external design is
11:40 13 basically saying can I use the results of the survey and apply
11:40 14 it to the broader population that I'm looking at? And okay.
11:40 15 That's -- you got to have external validity.

11:40 16 But if you don't have internal validity, in other words,
11:40 17 my survey's garbage, whether you have external validity is
11:40 18 irrelevant. And that's the point we're making. And so
11:40 19 external validity is really beside the point. They don't have
11:40 20 internal validity.

11:40 21 And when we asked Dr. Prince in his deposition about, do
11:40 22 you have any response to this? He did not. With respect to
11:41 23 the error rates that we've cited, Dr. Prince has no response to
11:41 24 that. And so this is all we have on this, is that we have a
11:41 25 study where the error rates are an F. They just don't pass

11:41 1 muster. And we don't believe that they pass Daubert, Your
11:41 2 Honor.

11:41 3 And with that, Your Honor, we believe that you should
11:41 4 grant our Daubert motion. If there's any questions --

11:41 5 THE COURT: No, sir.

11:41 6 Response?

11:41 7 MS. DE MORY: Good morning, Your Honor.

11:41 8 THE COURT: Good morning.

11:41 9 MS. DE MORY: Denise De Mory for plaintiff Theta IP.

11:41 10 If you can switch to the next slide.

11:41 11 So this Daubert motion is a classic non-Daubert motion.

11:42 12 This is a --

11:42 13 Can I get the next slide?

11:42 14 Disagreement is not a basis for a Daubert. So we just
11:42 15 heard a number of things about the "none of the above" option
11:42 16 and how it must be an option. Otherwise, this study does not
11:42 17 qualify as you cannot do the second step which is the economic
11:42 18 analysis.

11:42 19 And initially I want to start with that, which is this
11:42 20 notion that there is no ability to do both the survey and the
11:42 21 economic analysis. Really what normally happens is, because
11:42 22 Dr. Steckel is not an economic expert, which is why he didn't
11:42 23 understand the economic analysis. Normally he does the
11:42 24 conjoint survey and he passes it to, for example, Dr. Ugone,
11:42 25 who does the economic analysis.

11:42 1 But in this case Theta hired Dr. Prince who just stepped
11:42 2 down as the chief economist of the FCC. He is a Ph.D.
11:43 3 economics expert. He is also a survey expert. And so we just
11:43 4 happened to have the same person in one person. One expert.
11:43 5 And to suggest that there's no peer-reviewed authority for him
11:43 6 doing the microeconomic analysis that he did, this -- I happen
11:43 7 to have the ninth edition of his textbook here, but it's --
11:43 8 he's on the tenth. And the microeconomic analysis that he did,
11:43 9 the pictures which we're going to look at later in the Bergman
11:43 10 report for damages. But you'll see this slide later. The
11:43 11 analysis is in his textbook which is now in the tenth edition.
11:43 12 So that notion is just wrong from the perspective that you
11:43 13 can't do this two-part analysis, that it is nowhere supported.
11:43 14 It is just normally not found. These two skills are normally
11:43 15 not found in the same expert.
11:43 16 Now, in terms of the "none of the above" option, I just
11:44 17 heard opposing counsel talk about how there's nothing in our
11:44 18 papers or in the Prince report, other than this Allenby
11:44 19 article. Now, the first thing is the Allenby article itself
11:44 20 is -- doesn't -- says something beyond what counsel quoted on
11:44 21 his slide. And it says, whether or not the outside option is
11:44 22 included depends on the ultimate use of the conjoint survey.
11:44 23 Clearly it's possible to measure how respondents trade off
11:44 24 different product attributes against each other without
11:44 25 inclusion of an outside example -- outside option. For

11:44 1 example, it is possible to estimate price coefficient in a
11:44 2 conjoint survey which does not include the outside option.

11:44 3 In addition to that, we go on -- and that's a 2014
11:44 4 paper -- we go on and discuss, and Dr. Prince cites in his
11:44 5 report, a 2019 paper which discusses all the reasons why it is
11:45 6 not appropriate to make a reasoned decision by the person who's
11:45 7 conducting the study of whether or not you should include a
11:45 8 "none of the above" option.

11:45 9 And it gives a number -- three reasons why you should and
11:45 10 should not include it. And it goes on to say, you know, it may
11:45 11 actually bias the results in a way that you don't want them to
11:45 12 bias them.

11:45 13 So you do an analysis, which Dr. Prince did, and you make
11:45 14 a reasoned decision about whether or not the "none of the
11:45 15 above" option should be there. And so there are, in fact, not
11:45 16 just one but two peer-reviewed papers that are cited in the
11:45 17 Prince report and are cited in our opposition. And this is
11:45 18 really a classic disagreement between experts as to whether or
11:45 19 not the conjoint survey that was conducted should have included
11:45 20 a "none of the above" option.

11:45 21 So that is the "none of the above" option.

11:45 22 And then in terms of the internal and external validity --

11:45 23 We can go to the next slide.

11:45 24 -- it's the same debate. So I recall when we were talking
11:46 25 about the Steckel Daubert a minute ago, counsel actually said

11:46 1 there are actually two different ways to validate a survey.

11:46 2 One is external, and one is internal.

11:46 3 And that's the way he started the discussion with regard
11:46 4 to Steckel, and then he said Steckel criticizes this internal
11:46 5 validity.

11:46 6 There is no hard and fast rule that both forms of checks
11:46 7 need to be performed. In our papers and in Dr. Prince's
11:46 8 report, he cites peer-reviewed articles and -- that say that
11:46 9 both external and validity don't have to be assessed. There's
11:46 10 no dispute that Dr. Prince did an external validity test.

11:46 11 And the papers that we cite, in fact, say -- including
11:46 12 some of the ones that Dr. Steckel cites himself, say that the
11:46 13 external validity is the more rigid test for validating the
11:46 14 expert report and even say that the internal validity test is
11:46 15 only for a limited reason, which is to predict the -- a
11:47 16 consumer's, like, purchase decision as opposed to what
11:47 17 Dr. Prince was doing, which was applying it exactly as counsel
11:47 18 said, to the broader population and determining a willingness
11:47 19 to pay.

11:47 20 And so what Dr. Prince actually did is he put a control in
11:47 21 his survey, which was storage in a phone. And he actually
11:47 22 said -- he surveyed and he said, okay. So let me look at how
11:47 23 the survey respondents responded to how much more they would
11:47 24 pay for storage, and then he compared that to what actually
11:47 25 happens in the market. And he validated that the survey

11:47 1 actually predicted the external -- how much somebody would pay
11:47 2 for a feature, and that is an external validity.

11:47 3 And so we've cited a number of sources. This is a classic
11:47 4 dispute between the experts as to how the survey should be
11:47 5 formulated and how it should be validated, and it is something
11:47 6 that is not inappropriate for Daubert and it should be denied.

11:48 7 MR. MCKEON: Your Honor, if I may make a couple quick
11:48 8 points?

11:48 9 THE COURT: Whatever you care to.

11:48 10 MR. MCKEON: I think the -- leave aside the peer-reviewed
11:48 11 and general-acceptability point, I'm going to focus on the
11:48 12 error rates.

11:48 13 It's clear, Your Honor, and I think the literature is
11:48 14 clear on this, that -- and sort of the logic is clear, that
11:48 15 you've got to have internal validity and you have to have
11:48 16 external validity. Both tests are important.

11:48 17 But if you don't have internal validity, how are you going
11:48 18 to apply your survey results to a broader population?

11:48 19 There's no logical sense there, Your Honor, but the error
11:48 20 rates -- I want to focus on error rates. What counsel said
11:48 21 here, that Dr. Prince did this external validity analysis --
11:49 22 and he did, he -- the internal validity, there's no response to
11:49 23 that. But he did do an external validity analysis.

11:49 24 And what he did was, he compared actual memory -- the
11:49 25 prices of memory, which was one of the features in the survey.

11:49 1 And when he went to calculate the willingness to pay and
11:49 2 compared it to the actual market price to what happens in the
11:49 3 survey, he -- what he determined was that he had it -- it was
11:49 4 wrong.

11:49 5 So he had a lower -- he lowered it by 33 percent that he
11:49 6 was getting the -- it wasn't matching, that there was no
11:49 7 validity, and so he lowered it by 33 percent.

11:49 8 So even his analysis with respect to the external validity
11:49 9 was problematic.

11:49 10 But I just go back to the basic point, Your Honor, on the
11:49 11 errors. If you don't have internal validity, it's -- I mean,
11:50 12 it's -- basically, it's a random survey with a hit rate less
11:50 13 than 50 percent, then we don't believe it should go to the
11:50 14 jury, Your Honor.

11:50 15 With that I will sit down. Thank you.

11:50 16 THE COURT: Anything else?

11:50 17 MS. DE MORY: Very briefly, Your Honor. It is the case
11:50 18 that it is disputed whether or not you have to do internal
11:50 19 validity check for the purpose for which this survey was used.
11:50 20 And there are peer-reviewed papers and Prince's report in our
11:50 21 opposition on that point. So that's it.

11:50 22 (Off-the-record bench conference.)

11:51 23 THE COURT: Court is going to deny the motion.

11:51 24 We are going to take our lunch recess. Why don't we plan
11:51 25 on getting started at 1:15? I think that will give everyone

11:51 1 enough time. For those of you who are not from Waco, there's a
11:51 2 big food court right next door. And then there are restaurants
11:51 3 within a couple of blocks. So I'll see you.

11:51 4 THE BAILIFF: All rise.

11:51 5 (Recess taken from 11:51 to 1:19.)

01:19 6 THE BAILIFF: All rise.

01:19 7 THE COURT: Thank you. You may be seated.

01:19 8 Ladies and gentlemen, over the break I talked to my law
01:19 9 clerks, and I think I erred earlier when I said I was
01:19 10 invalidating the patent. I don't remember the patent number.
01:19 11 But what I'm going to do is I'm going to dismiss the patent
01:19 12 from the case.

01:19 13 In my opinion, it may have been in the complaint, but as I
01:19 14 understand it, and the plaintiff can correct me, there are
01:19 15 never any infringement contentions of the uncorrected patent
01:19 16 provided or anything done in the case.

01:20 17 So I'm dismissing it without prejudice. If the plaintiff
01:20 18 wants to reassert it in the uncorrected form, that's up to you.
01:20 19 But I'm dismissing the -- I'm not invalidating it. I'm not
01:20 20 going to invalidate, but I am going to dismiss it without
01:20 21 prejudice from the case, in that you have not prosecuted that
01:20 22 patent in this case.

01:20 23 MS. DE MORY: Thank you.

01:20 24 THE COURT: So let me turn, then, to -- Jeff just
01:20 25 suggested to me that we go back, because the -- my

01:21 1 understanding is the lawyer is now -- well, he always was
01:21 2 available, but my understanding is that we can now
01:21 3 technically -- oh, is not right?

01:21 4 Kristie's shaking her head.

01:21 5 MR. CORDELL: We came close, Your Honor. We were able to
01:21 6 get him in on everything except for your microphone. And we
01:21 7 were a little worried that you might be the person we should
01:21 8 actually involve. So we decided to have Mr. Black just pick up
01:21 9 the arguments.

01:21 10 THE COURT: Okay. Very good. Mr. Black?

01:21 11 MR. BLACK: Thank you, Your Honor.

01:21 12 So the good news is I've only had ten minutes to prepare
01:21 13 and therefore this will be relatively brief. I know we're on
01:21 14 limited time, and I'll try not to speak --

01:21 15 THE COURT: I had a trial once where everyone settled that
01:21 16 morning, and Judge Davis told me he would give me an extra
01:21 17 15 minutes to get ready for the opening argument.

01:21 18 MR. BLACK: Okay. This is nothing like that. I will try
01:21 19 not to talk too fast. I've been told I'm up against the
01:21 20 transcription limit, so I will try to keep the comments smooth.

01:21 21 Okay, Your Honor. So we have two motions here that are
01:21 22 joined together, motion for partial summary judgment of no
01:22 23 indirect infringement and motion for partial summary judgment
01:22 24 of no willfulness.

01:22 25 They really turn on the same set of facts, whether or not

01:22 1 there is sufficient scienter to justify putting to the jury the
01:22 2 question of induced infringement or willfulness. We have the
01:22 3 legal standards here. Your Honor knows them well. Your Honor
01:22 4 applies them frequently in evaluating complaints.

01:22 5 Now, the interesting thing about this case is we have
01:22 6 three patents -- or we did have three patents. Each of which
01:22 7 would require independent proof of indirect infringement and
01:22 8 willfulness evidence. The plaintiff is proceeding rather
01:22 9 unusually on a willful blindness path. And what that means is
01:22 10 they have to show under the law that the -- there's evidence
01:22 11 that -- of conduct that is not negligent, not reckless, but
01:22 12 more than reckless conduct is what's at stake here.

01:22 13 And they do not have any evidence that would support that
01:22 14 kind of an inference. And it is their burden. They can't meet
01:23 15 that burden by arguing about Samsung's privileged objections or
01:23 16 whatever. They have to show that there's going to be evidence
01:23 17 that they're going to produce at trial.

01:23 18 And we've filed a Rule 56 motion. It's their time to come
01:23 19 forward and show us what the evidence is. And the problem is
01:23 20 they don't have any evidence.

01:23 21 On Count 3 of the complaint for the '202 patent, that
01:23 22 patent was filed long after the original settlement in the
01:23 23 case. And there's no evidence that Samsung was aware of it.
01:23 24 And therefore, as a matter of law, we're entitled to judgment
01:23 25 of no indirect liability and no willfulness with respect to the

01:23 1 '202.

01:23 2 On Count 2 of the complaint, the '825 patent, the
01:23 3 application for that patent was known to Samsung at the time of
01:23 4 the original settlement. However, however, the claims that
01:23 5 were pending at the time of the settlement were all cancelled,
01:23 6 every single one of them. They stood rejected at the time of
01:23 7 the settlement and then they were cancelled six months later,
01:24 8 and they were replaced with new claims which eventually issued
01:24 9 into the claims that are involved in this case.

01:24 10 So their argument with respect to those claims is that
01:24 11 Samsung was willfully blind because it failed to follow the
01:24 12 prosecution of their patent applications through the Patent
01:24 13 Office. Even though they obviously made decisions along the
01:24 14 way to not give us notice when the '962 issued, not give us
01:24 15 notice when the '825 issued, not give us notice when the '202
01:24 16 issued.

01:24 17 Those were conscious litigation-driven decisions, and they
01:24 18 have to live with the consequences of them. They can't push
01:24 19 our lack of knowledge back on us, saying we had some
01:24 20 affirmative obligation.

01:24 21 There's no case law supporting what they're doing here.
01:24 22 And the law is pretty clear. Willful blindness doesn't mean
01:24 23 negligence, it doesn't mean reckless. It means more than
01:24 24 reckless conduct, and the only evidence they have and the only
01:24 25 fact they have is that we were aware of rejected, ultimately

01:24 1 not issued claims in the '825 patent, and they have no evidence
01:25 2 on the '202.

01:25 3 The '962, Count 1, that's now out of the case. So what's
01:25 4 their evidence? Here's the time to show it at summary
01:25 5 judgment. Where's the positive evidence?

01:25 6 They don't have any.

01:25 7 That's our submission, Your Honor.

01:25 8 MR. BUNSOW: Good afternoon, Your Honor.

01:25 9 THE COURT: Good afternoon.

01:25 10 MR. BUNSOW: Henry Bunsow for Theta IP.

01:25 11 THE COURT: I think this is the first time I've had you in
01:25 12 my court, isn't it?

01:25 13 MR. BUNSOW: Your Honor, this is the first time, and I
01:25 14 have to confess that I've been spending the last decade in the
01:25 15 Eastern District of Texas.

01:25 16 THE COURT: That's okay. I spent a lot of time in the
01:25 17 Eastern District of Texas.

01:25 18 MR. BUNSOW: I'll tell you, I like the drive here from
01:25 19 Dallas a lot better.

01:25 20 THE COURT: Well, it's -- let's see. It's shorter, I
01:25 21 guess, for sure shorter than Tyler, isn't it?

01:25 22 MR. BUNSOW: Oh, and way shorter than Marshall.

01:25 23 THE COURT: Way shorter than Marshall, for sure.

01:25 24 MR. BUNSOW: For sure. And I'd say better scenery too.

01:25 25 So there are two motions here, the one on willfulness and

01:26 1 the one on induced infringement allowing us to go back in time,
01:26 2 pre-filing, for damages, and both of those are supported by the
01:26 3 case law on a willful blindness showing and also because the
01:26 4 jury can infer, based on the evidence that will be presented,
01:26 5 that Samsung knew or should have known.

01:26 6 And remember, that's the test, knew or should have known,
01:26 7 very similar to the test in statute of limitations.

01:26 8 What counsel failed to mention is that in 2017, when the
01:26 9 prior case was resolved, there was a covenant not to sue. And
01:26 10 during those negotiations, Samsung explicitly asked for the
01:26 11 covenant not to sue to extend to all patents in that family,
01:27 12 from the parent to all siblings.

01:27 13 At that time, there were two siblings pending, another
01:27 14 sibling came along later, but Samsung knew that those patents
01:27 15 could be a problem down the road and they tried to get
01:27 16 clearance. Theta told them, no, that they would not grant them
01:27 17 licenses to those patents.

01:27 18 Now, Samsung is not a babe in the woods when it comes to
01:27 19 patent matters. They're one of the most litigious patent
01:27 20 litigants in the country and have been for many, many years.

01:27 21 So when faced with the prospect that patents coming off
01:27 22 the parent that was previously litigated might be a problem, I
01:27 23 would submit to you that that alone meets the knew or should
01:28 24 have known test for them to be responsible for willful
01:28 25 blindness or for their knowledge to be implied.

01:28 1 But that's not all. Up until the time of the covenant not
01:28 2 to sue, Samsung regularly tested its products and they tested
01:28 3 power consumption for differing signals, basically what we're
01:28 4 talking about in these patents at a high level. They did that
01:28 5 testing through the end of that case, and they documented it
01:28 6 regularly.

01:28 7 After they asked for a license to the siblings of the
01:28 8 parent application, suddenly the documenting stopped, but
01:29 9 Samsung didn't stop the testing. They continued doing the
01:29 10 testing. They just stopped documenting it. And the reason
01:29 11 they stopped documenting it is because they knew that they
01:29 12 could be facing a patent infringement claim down the line on
01:29 13 these patents that dealt with power modifications for varying
01:29 14 signals, and they didn't want a record showing that they
01:29 15 continued to test.

01:29 16 That alone shows their knowledge of the applications that
01:29 17 were pending and the prospect that they might be responsible.
01:29 18 They knew or should have known.

01:29 19 THE COURT: Did you depose anyone at Samsung, 30(b)(6) or
01:29 20 otherwise, to inquire the reason the documentation stopped?

01:30 21 MR. BUNSOW: We did. There was a 30(b)(6) witness that we
01:30 22 deposed. And he confirmed that the documenting stopped but the
01:30 23 testing continued. And there was no reason given for that.

01:30 24 But there's more. Because we went further in discovery on
01:30 25 this issue with their 30(b)(6) witnesses, with interrogatories

01:30 1 and with every type of discovery we could think of. As you
01:30 2 know, this issue has been before the Court several times.

01:30 3 This is the subject matter of Motion in Limine No. 3.
01:30 4 Basically Samsung blocked, under claim of privilege, any effort
01:30 5 to ascertain their direct knowledge. Not that direct knowledge
01:30 6 is necessary, but, nonetheless, to block our getting direct
01:30 7 knowledge.

01:30 8 They have no answer to the circumstantial evidence that
01:31 9 shows that they knew or should have known about these
01:31 10 applications and that they were in jeopardy. They have no
01:31 11 response. The only thing they have is an unverified
01:31 12 interrogatory answer where they say that having learned of the
01:31 13 applications, they did not follow them and did nothing else.
01:31 14 In other words, willful blindness.

01:31 15 But that unverified interrogatory answer is hearsay. It's
01:31 16 not admissible into evidence. And every witness we asked about
01:31 17 this was blocked on a privilege claim. And you warned them
01:31 18 what would happen with those types of privilege objections and
01:31 19 they persisted anyway.

01:31 20 So here's the state of the record: Samsung knew in 2017
01:31 21 that there were sibling applications coming off of the parent
01:32 22 that they had previously been sued under. Samsung asked for a
01:32 23 license, clearance to those sibling applications and was
01:32 24 denied. Samsung had been doing testing, and they knew that
01:32 25 their products practiced at least what was disclosed in the

01:32 1 specification of those patents.

01:32 2 This was a huge red flag, a red flag for a company that is
01:32 3 a sophisticated patent litigant, which they decided to ignore.
01:32 4 We have cited multiple cases on Pages 10 and 11 of our brief
01:32 5 that supports a finding of willful blindness in this case,
01:32 6 supports induced infringement and supports willfulness.

01:32 7 In the final analysis this may come down to a credibility
01:33 8 issue if they're allowed to put on any evidence. They
01:33 9 shouldn't be, and we'll see what happens with Motion in Limine
01:33 10 No. 3. But if they claim somehow that they had no knowledge,
01:33 11 that is simply incredible. And we all know credibility is an
01:33 12 issue for the jury. And I think I know how they would decide.

01:33 13 THE COURT: Well, on the willfulness, that -- that's in
01:33 14 front of me.

01:33 15 MR. BUNSOW: Correct.

01:33 16 THE COURT: Okay. Got it.

01:33 17 MR. BUNSOW: That is correct. The credibility issue on
01:33 18 the inducement would be for the jury.

01:33 19 THE COURT: Got it.

01:33 20 MR. BUNSOW: Thank you, Your Honor. I appreciate, by the
01:33 21 way, all the time you've given us today. It was very generous.

01:33 22 THE COURT: You're more than welcome. Well, I have the
01:33 23 best job in the world. I get to have the best lawyers in the
01:33 24 world appear in front of me routinely. So it's -- and there
01:33 25 are days I shouldn't even get paid for doing this, and this is

01:33 1 probably one of them.

01:33 2 MR. BUNSOW: I'm not sure I'd put that on the record, but
01:34 3 thank you.

01:34 4 THE COURT: Every time I have a hearing with lawyers this
01:34 5 good, I walk in and out of the courthouse feeling unbelievably
01:34 6 blessed.

01:34 7 MR. BUNSOW: Thank you, Your Honor.

01:34 8 THE COURT: Mr. Black?

01:34 9 MR. BLACK: Certainly, Your Honor.

01:34 10 So everything we just heard about the law and about the
01:34 11 facts and about what's in their motion is wrong. The standard
01:34 12 under current law, 2015, the Commil case, Supreme Court, is:
01:34 13 Like induced infringement, contributory infringement requires
01:34 14 knowledge of the patent-in-suit and knowledge of the patent
01:34 15 infringement.

01:34 16 Not if they knew or should have known standard. This is
01:34 17 the Federal Circuit, 2021: To establish willfulness, the
01:34 18 patentee must show the accused infringer had a specific intent
01:34 19 to infringe at the time of the challenged conduct.

01:35 20 Specific intent. There must be knowledge of the patent
01:35 21 and knowledge that the activities in question are, in fact,
01:35 22 infringing.

01:35 23 I addressed the knowledge of the patent issue. You heard
01:35 24 nothing at all about the '202 patent. There's no evidence
01:35 25 whatsoever in the case that anyone from Samsung knew about the

01:35 1 '202 patent. There's no evidence they knew about the '825
01:35 2 patent before they were sued.

01:35 3 There is deposition testimony on it. It's in our brief.
01:35 4 Our witnesses said, unequivocally, we did not know about those
01:35 5 patents. We were not monitoring prosecution.

01:35 6 There was no privilege claim made on that. We provided an
01:35 7 interrogatory answer on it. They don't like the answer. The
01:35 8 answer was verified, and it was supported in the 30(b)(6)
01:35 9 deposition.

01:35 10 This business about power testing, well, I imagine Samsung
01:35 11 does testing of power control on some of its products, but what
01:36 12 does that have to do with showing that there is infringement in
01:36 13 this case? What does that have to do with the patents?

01:36 14 That's not been shown. There's no inference that because
01:36 15 Samsung does power testing or did or didn't document something
01:36 16 over a period of time that that is somehow evidence of willful
01:36 17 blindness, evidence of indirect infringement.

01:36 18 There's just no evidence in the case that they've produced
01:36 19 in their brief, other than the fact that we had a prior
01:36 20 litigation with them, which was dismissed. The '825 patent
01:36 21 claims did not exist at the time of the case settlement. The
01:36 22 '202 had not even been filed.

01:36 23 They know that under the law they can collect damages for
01:36 24 pre-suit infringement if they provide the notice that's
01:36 25 required, notice of infringement or marking if they made

01:36 1 products, which they don't. But they decided not to do that.
01:36 2 That decision was on them. And they cannot rely solely on the
01:37 3 argument that because Samsung asked for a broad covenant so
01:37 4 that they'd never have to hear from these people again, which
01:37 5 is what happened, they cannot rely on that to say that, oh, if
01:37 6 they ever do get any patents later, Samsung's now willfully
01:37 7 blind under the law and subject to willfulness and indirect
01:37 8 infringement.

01:37 9 Patentee bears some burden here. And in this case they
01:37 10 bear the burden of telling the patentee, the alleged infringer,
01:37 11 about the infringement and the nature of the infringement.

01:37 12 It's particularly a problem here because what was accused
01:37 13 in the last case was a product called IntelliCeiver. And
01:37 14 that's what they sued us on. They sued us on IntelliCeiver,
01:37 15 and then only after this case got started did they learn that
01:37 16 we don't use it anymore. And that therefore their entire
01:37 17 infringement theory had to be reworked.

01:37 18 But from a willful infringement inducement perspective, we
01:37 19 did not know about the patents. We did not know about the
01:37 20 alleged infringement. And there's clearly insufficient
01:37 21 evidence to support a finding under the appropriate legal
01:38 22 standard, which is that we would have to be more than reckless
01:38 23 in knowing that we were infringers, when even they did not know
01:38 24 when they filed this case that we had stopped using
01:38 25 IntelliCeiver.

01:38 1 But the bottom line, there's been no case that the Federal
01:38 2 Circuit has ever affirmed, and we're not aware of any district
01:38 3 court cases either, where someone's been allowed to go to trial
01:38 4 on an issue, or even get past a complaint on an issue where
01:38 5 they didn't even have knowledge of the patent like the '202.
01:38 6 Or where a patent was in prosecution and the claims were
01:38 7 completely changed.

01:38 8 They just haven't met their burden of production on
01:38 9 summary judgment and the issue should not be submitted to the
01:38 10 jury.

01:38 11 THE COURT: Anything else, sir?

01:38 12 MR. BUNSOW: Very briefly, Your Honor. All of the cases
01:38 13 that we cite on Pages 10 and 11 were summary judgment cases
01:38 14 where the -- this exact motion, basically, was denied. And
01:38 15 counsel talks about evidence that they did not know about the
01:39 16 patents. We've provided, I think, ample evidence that they
01:39 17 knew or should have known or actually did know, from which a
01:39 18 jury could infer that they did know.

01:39 19 He points to an interrogatory response and a 30(b)(6)
01:39 20 statement from a witness with no personal knowledge who simply
01:39 21 read what counsel wrote for him so he could read it into the
01:39 22 record of a deposition, neither of which, I submit, are
01:39 23 introducible into evidence and will not be part of the record
01:39 24 of this case.

01:39 25 So what the jury will have is Samsung's knowledge that

01:39 1 applications were coming out of the parent application -- the
01:39 2 parent patent rather. And that it sought a license to those
01:39 3 and was denied, that they related directly to the technology at
01:39 4 issue in this case. And I submit that that alone is sufficient
01:40 5 from which a jury could infer their knowledge, and that it will
01:40 6 support inducement.

01:40 7 I agree with you that willfulness is for the Court, and I
01:40 8 think we should probably take that up after the evidence is in.
01:40 9 I think the record will support willfulness at that time as
01:40 10 well.

01:40 11 Thank you, Your Honor.

01:40 12 THE COURT: Anything else?

01:40 13 MR. BLACK: Yeah. Just we have to separate out the
01:40 14 patents here, Your Honor.

01:40 15 At the time of the settlement, there were two applications
01:40 16 pending. One was the '962 patent application, which is now out
01:40 17 of the case, so it's irrelevant. The '825 application didn't
01:40 18 include the claims at issue here. They had been rejected and
01:40 19 were all cancelled.

01:40 20 Are you willfully blind to infringing rejected claims in
01:40 21 the Patent Office? Are you required to monitor all your
01:40 22 competitors' applications to see what they may do, or are the
01:40 23 competitors required to give you notice when they think there's
01:41 24 a problem?

01:41 25 That's what this is about. All these claims were

01:41 1 rejected. They filed new ones, which is what are at issue now.

01:41 2 And on the '202, there's no evidence whatsoever.

01:41 3 They have not produced a case from which you could
01:41 4 conclude -- any reasonable jury could conclude that Samsung had
01:41 5 knowledge or was beyond reckless.

01:41 6 In addition, they haven't address the fact that the key
01:41 7 infringement evidence in the case came from Qualcomm source
01:41 8 code, which is not available to Samsung. And to the extent
01:41 9 they are going to put forward a case on inducement, they cannot
01:41 10 rely on that information because it was not within Samsung's
01:41 11 knowledge.

01:41 12 There was neither knowledge of the patent nor knowledge of
01:41 13 the nature of infringement before suit or, frankly, until they
01:41 14 gave us final infringement contentions in the middle of 2021.

01:41 15 Thank you.

01:41 16 MR. BUNSOW: Two things, Your Honor.

01:41 17 Counsel himself stated that the request for a license
01:42 18 included the entire family coming off of the parent patent.
01:42 19 There's no reason to parse out one application over another.
01:42 20 It was the parent. And as you know, all of these siblings are
01:42 21 tracked off the parent in the Patent Office records and they're
01:42 22 very easy to follow.

01:42 23 So if they followed one, they followed them all. There's
01:42 24 no question about that.

01:42 25 The second thing is -- and I just want to do this by way

01:42 1 of an offer of proof if possible -- Samsung knows what's in the
01:42 2 Qualcomm code because they have the code, and they have the
01:42 3 code that relates to this particular functionality.

01:42 4 We have copies of that, both the Samsung and the Qualcomm
01:42 5 code. It is identical line for line. What Samsung has been
01:42 6 saying in this case about not knowing what's in the Qualcomm
01:43 7 code is absolutely false, and we will prove it.

01:43 8 Thank you.

01:43 9 MR. BLACK: There was a request at the time of the
01:43 10 settlement, Your Honor, to be done with these people, we said,
01:43 11 we would like you to give us the license to all your patents,
01:43 12 they said no.

01:43 13 This happens every day in negotiations between companies.
01:43 14 You don't walk away with a licensed negotiation pregnant with a
01:43 15 requirement to monitor a counterparty's patent applications.

01:43 16 There's no evidence in the case on the '202. On the '825,
01:43 17 the claims that were at issue at the time of the settlement
01:43 18 were -- had been rejected, were cancelled. They amended those
01:43 19 claims. That's why we're here. There's been no knowledge of
01:43 20 the amended claims or the '202 patent.

01:43 21 Thank you.

01:43 22 THE COURT: Anything else?

01:43 23 MR. BUNSOW: I think we joined issue adequately, Your
01:43 24 Honor.

01:44 25 (Off-the-record bench conference.)

01:46 1 THE COURT: With respect to the '202 patent, the Court is
01:46 2 going to grant the motion for summary judgment with respect to
01:47 3 any claim of willfulness.

01:47 4 With respect to both the '202 and the '825 patent, the
01:47 5 Court is going to deny the motion for summary judgment with
01:47 6 respect to claims of indirect infringement.

01:47 7 So let me find what the next motion is. Give me one
01:47 8 second.

01:47 9 MS. DE MORY: I'm sorry.

01:47 10 THE COURT: Yes, ma'am.

01:47 11 MS. DE MORY: So we have up next the objections to
01:47 12 witnesses that we filed, but we're actually going to take those
01:47 13 up with our motions in limine because they overlap
01:47 14 substantially.

01:47 15 THE COURT: Have we done all the Dauberts?

01:48 16 MS. DE MORY: Oh, okay. Sorry. I got up before somebody
01:48 17 else.

01:48 18 THE COURT: If it -- yeah. Okay. If it wasn't clear, by
01:48 19 omission, my law clerk just reminded me, I granted the motion
01:48 20 for summary judgment with regard to the '202 patent and
01:48 21 willfulness. I'm denying it with respect to the '825, if that
01:48 22 wasn't clear. So I apologize if it wasn't.

01:48 23 And then with respect to indirect infringement, it's still
01:48 24 in the case for both the '202 and the '825.

01:48 25 MR. MCKEON: I believe our next motion, Your Honor,

01:48 1 relates to Dr. Larson. It's a Daubert.

01:48 2 THE COURT: That's what I have. Yes. Thank you.

01:48 3 MR. MCKEON: All right. So with respect to this issue,
01:48 4 Your Honor, it's related. Even though Dr. Larson's a technical
01:49 5 expert, this relates to the damages case. And what Dr. Larson
01:49 6 did was did an analysis on an accused product, is try to
01:49 7 evaluate with respect to the patented feature, tried to
01:49 8 evaluate what battery savings would be achieved with the use of
01:49 9 the patented feature.

01:49 10 And in the end he comes out with a 20.9-minute battery --
01:49 11 extra battery life by using -- the allegation is by Samsung's
01:49 12 use of the patented feature they gain an extra 20.9 minutes of
01:49 13 battery life. And it's a technical analysis that he undergoes.

01:49 14 But there's two, we believe, significant problems that
01:49 15 will prevent this from going to the jury. One relates to
01:49 16 apportionment which is, you know, standard damages law. But
01:49 17 it's important to consider this issue in the context of when
01:49 18 you're evaluating technical improvements. And the other is a
01:49 19 speculation that Dr. Larson does in his analysis.

01:50 20 So let me just hit it quickly here on the first one, the
01:50 21 apportionment. Your Honor knows the law well, but I want to
01:50 22 put a real fine point on the issue that we're talking about.
01:50 23 We know that in every case, in every case you got to have
01:50 24 apportionment from the profits and the damages with respect to
01:50 25 the patented feature and the unpatented feature. So that's the

01:50 1 comparison that has to happen. What the improvement is, the
01:50 2 patented feature, and what is out there unpatented in the prior
01:50 3 art.

01:50 4 More case law we have here on Slide 5, Your Honor. The
01:50 5 Lucent case I know you're well aware of. You have to show the
01:50 6 particular improvement that is added for the patented feature.
01:50 7 And then the AstraZeneca case that we cite here is a really, I
01:50 8 think, helpful case. That you have to show the value created
01:50 9 beyond conventional elements. So that's -- frames up what the
01:50 10 analysis needs to be.

01:50 11 And what happened here in this case, Your Honor, starting
01:51 12 in the prosecution history of the patents at issue, but even in
01:51 13 the Markman process, they're very clear here that in the prior
01:51 14 art, in the prior art the two current modes or two states with
01:51 15 respect to battery savings -- to achieve battery savings by
01:51 16 having these two states, that is in the prior art.

01:51 17 And they've said that to Your Honor in the briefing.
01:51 18 Dr. Tsividis, the inventor, is very clear on that, that
01:51 19 switching between two levels -- that you're trying to achieve
01:51 20 battery savings by switching between two levels, that's in the
01:51 21 prior art. And their corporate representative, again, same
01:51 22 testimony in this case.

01:51 23 And what did Dr. Larson do in the technical part of his
01:51 24 analysis?

01:51 25 And here on the screen it shows you what he did, and it's

01:51 1 very simple. What he did was, he analyzed it between two
01:51 2 states. Two states was the analysis that he did to evaluate
01:51 3 the power savings to come up with this 20.9 minutes. That's
01:52 4 precisely the prior art approach.

01:52 5 So all he has done here is evaluated -- to the extent you
01:52 6 can rely on his analysis, the only thing he's done, at best, is
01:52 7 evaluated what the improvement would be with doing the prior
01:52 8 art.

01:52 9 And we just think, Your Honor, that's just -- he's got to
01:52 10 do more than that. He's got to isolate the patented feature.
01:52 11 It's admitted that the test that he performed here is the prior
01:52 12 art. And we think, Your Honor, that's not good enough. He's
01:52 13 got to do more than that under the case law.

01:52 14 And the second point, Your Honor, is the speculation. And
01:52 15 what's going on there?

01:52 16 In this test, what Dr. Larson did was, he took a phone --
01:52 17 represented a phone and he used a Verizon test that Verizon
01:52 18 has. It's called Verizon Idle Mode. And when you want to test
01:52 19 battery life in a phone, you can use the Verizon Idle Mode.

01:52 20 But what is critical is, if you're going to use the

01:52 21 [REDACTED]

01:53 22 [REDACTED]

01:53 23 [REDACTED]

01:53 24 you get vastly different results because they're different
01:53 25 power levels.

01:53 1 And he did the test, and what he used was the power state
01:53 2 cDRX. This is what he says in his report and his deposition.

01:53 3 Well, not that this is -- matters, frankly, Your Honor,

01:53 4 [REDACTED]

01:53 5 [REDACTED] It

01:53 6 means you're connected to the network.

01:53 7 In the idle mode, you're not. It's DRX. That was the
01:53 8 mode that's relevant here. And when we asked in his deposition
01:53 9 the difference between the cDRX and the DRX [REDACTED]

01:53 10 [REDACTED], his testimony, Your

01:54 11 Honor: I have no idea.

01:54 12 He doesn't know.

01:54 13 Now, again, our expert says it's DRX, but you don't even
01:54 14 need to get into that point. He doesn't even know what the
01:54 15 right mode is. And we know that it's different. You get a
01:54 16 different result depending on which one you use.

01:54 17 And based on that, Your Honor, it's -- his result is
01:54 18 purely speculative. So whether it's an apportionment problem
01:54 19 or the speculation problem, we think that this analysis
01:54 20 shouldn't be able to go to the jury.

01:54 21 And with that, Your Honor, I submit the issue. Thank you.

01:54 22 THE COURT: If you'll give me just one second.

01:54 23 (Off-the-record bench conference.)

01:54 24 THE COURT: The Court is going to deny that motion.

01:55 25 The next motion up I have -- he may be there. I don't

01:55 1 know who's going to do this for the plaintiffs. On my chart it
01:55 2 says plaintiffs have a Daubert on damages. So that's what I
01:55 3 have up next.

01:55 4 Yes, sir. Good morning -- good afternoon.

01:55 5 MR. FLYNN-O'BRIEN: Good morning -- good afternoon, Your
01:55 6 Honor. This is Michael Flynn-O'Brien for Theta IP. And I'll
01:55 7 be arguing Theta's motion to preclude testimony regarding
01:55 8 alleged comparable licenses.

01:55 9 All right. In this case Samsung seeks to present the
01:55 10 damages case to the jury based on two prior license agreements.
01:55 11 As this Court is well aware, a reasonable royalty determination
01:55 12 may be based on a prior license agreement, but only if they are
01:56 13 economically and technically comparable to the asserted
01:56 14 patents.

01:56 15 Here Samsung fails both tests. Its technical expert does
01:56 16 not present any reliable evidence or analysis of technical
01:56 17 comparability. Its damages expert does not present any
01:56 18 reliable evidence or analysis of economic comparability.

01:56 19 This is Samsung's burden and it has not met it. As such,
01:56 20 their testimony on these license agreements should be excluded.

01:56 21 As background, even though Samsung has undoubtedly entered
01:56 22 into hundreds of license agreements, it only produced four in
01:56 23 this case. And it produced no additional information at all
01:56 24 about those four agreements.

01:56 25 When we asked their 30(b)(6) witness on these topics for

01:56 1 additional information, he didn't recognize one of them, one of
01:56 2 which happens to be one of the two that Samsung's damages
01:56 3 expert relies upon in this case. Their 30(b)(6) witness
01:56 4 couldn't explain why these four agreements had been chosen.
01:56 5 And he couldn't provide any details about the circumstances of
01:57 6 these agreements whatsoever.

01:57 7 Against that background, here comes Samsung's technical
01:57 8 and damages experts. First instance, Samsung's technical
01:57 9 expert fails to apply any standard for technical comparability
01:57 10 at all. He bases his opinions on mere cursory statements. He
01:57 11 provides single-sentence opinions, and provides no analysis
01:57 12 whatsoever as to how the patents at issue in the challenged
01:57 13 licenses are comparable to the technology at issue in this
01:57 14 case.

01:57 15 Here are the two agreements. On the left there's a
01:57 16 settlement agreement that we've called the [REDACTED] agreement.
01:57 17 Dr. Kiaei, Samsung's technical expert's opinion on this
01:57 18 agreement is contained in a single sentence in his report.
01:57 19 There are no citations to the underlying patent. There's not
01:57 20 assessment of the differences in the technology between the
01:57 21 patent at issue in that agreement and the patents at issue in
01:57 22 this case. There's no assessment whether or how inventions
01:58 23 would actually work in the context of the technologies at issue
01:58 24 here. There's no assessment of the power savings or battery
01:58 25 life, if any, that would have been provided by that patent.

01:58 1 There's no assessment of the costs to implement the inventions.
01:58 2 There's no comparison beyond general reference to power
01:58 3 consumption and digital processor or electronics.

01:58 4 But perhaps the most damning here is their citations to
01:58 5 the actual, you know, substantive spec or claims of the patent
01:58 6 at issue in the [REDACTED] agreement.

01:58 7 But the other agreement at issue, Dr. Kiaei's analysis
01:58 8 fares no better. Again, there are -- I think there are five
01:58 9 patents at issue in that agreement. With respect to each he
01:58 10 provides a single sentence for just generally describing the
01:58 11 field of use, the patent at issue. Again, he provides no
01:58 12 citations to the underlying patents, no assessment of the
01:58 13 differences in technologies, no assessment of how the patents
01:58 14 would work, no assessment of power savings or battery life,
01:58 15 et cetera.

01:58 16 So as discussed above and in the cases cited in our
01:59 17 motion, merely because patents could be said to be in the same
01:59 18 field of use does not make the patents technically comparable.
01:59 19 This is a sort-of technical comparability or lack of technical
01:59 20 comparability analysis that courts routinely preclude experts
01:59 21 from making. The Court should do the same here.

01:59 22 Next slide, please.

01:59 23 Samsung's damages expert, Dr. Ugone, doesn't fare any
01:59 24 better on economic comparability. The portion of his report
01:59 25 related to these two agreements is shown here on this slide.

01:59 1 Again, we have lack of citations. We have a lack of analysis.
01:59 2 He utterly fails to access the utility of a [REDACTED]
01:59 3 patents, much less compare the utility of those patents to the
01:59 4 utility of the Theta patents at issue in this case. He fails
01:59 5 to access the economic circumstances of the parties negotiating
01:59 6 those agreements or the economic circumstances of those
01:59 7 particular negotiations.

01:59 8 He fails to account for the fact that those licenses were
02:00 9 not negotiated under assumptions of validity or infringement.

02:00 10 In his papers, Samsung tries to bob and weave through the
02:00 11 case law on this subject but to no avail. Because what we have
02:00 12 here is a pair of experts that provide no analysis on the
02:00 13 issues at all.

02:00 14 So the -- here, the threshold question is admissibility,
02:00 15 not weight. And because Samsung's experts have not shown or
02:00 16 not carried Samsung's burden that the underlying technology is
02:00 17 technically comparable or that the agreements are economically
02:00 18 comparable, Samsung's expert opinions on these licenses should
02:00 19 be excluded.

02:00 20 And I'll pass the podium.

02:00 21 MR. TISHMAN: Good afternoon, Your Honor. Daniel Tishman
02:00 22 on behalf of defendants.

02:00 23 May it please the Court.

02:00 24 THE COURT: Welcome to my court.

02:00 25 MR. TISHMAN: Thank you.

02:00 1 Your Honor, the first thing I want to address is one of
02:00 2 the things that my co- -- or my counsel discussed at the very
02:01 3 beginning related to discovery disputes.

02:01 4 He talked about the number of licenses that were produced.
02:01 5 That's an issue that -- we're well past discovery, so I just
02:01 6 want to set that aside.

02:01 7 On the issues of technical and economic comparability,
02:01 8 I'll be brief, Your Honor. This is a fairly straightforward
02:01 9 issue.

02:01 10 Dr. Kiaei offered reliable testimony -- or reliable
02:01 11 opinions on technical comparability. The law requires an
02:01 12 expert to provide a baseline of comparability, but the degree
02:01 13 of comparability is something that's reserved to the jury.

02:01 14 On technical comparability, Dr. Kiaei explained that the
02:01 15 patents in the [REDACTED] licenses related to
02:01 16 technical -- technically comparable technology. He explained
02:01 17 that the [REDACTED] patent related to power conservation within a
02:01 18 specific component of an electrical system and that it could be
02:01 19 incorporated into a mobile phone.

02:01 20 So he explained the field is comparable, the invention is
02:02 21 comparable and the products are comparable.

02:02 22 THE COURT: Well, he makes that statement. I get that.
02:02 23 What does he do to support that statement in his report?

02:02 24 I mean, I get someone -- either he or someone helpful to
02:02 25 him put that in there because I know you needed to have that

02:02 1 for your damages expert, but where does he explain the basis of
02:02 2 that just conclusory sentence? Anywhere?

02:02 3 MR. TISHMAN: It's a rather short section, but it says
02:02 4 what it needs to say. He identifies the patent --

02:02 5 THE COURT: Well, I was going to say, I think I get to be
02:02 6 the judge of that. Not to be funny, but what I -- I mean, he
02:02 7 makes the statement -- he makes the conclusory statement X.
02:02 8 Where does he explain in his report -- if someone on
02:02 9 plaintiff's counsel says, what is your basis for saying that?

02:03 10 And I restrict the expert to what he has disclosed in his
02:03 11 report in his answer, where is it at in his report, his basis
02:03 12 for saying that?

02:03 13 MR. TISHMAN: It's in this -- these two paragraphs, Your
02:03 14 Honor, 506 and 507. He identifies the patent. He doesn't give
02:03 15 a pincite, but he points to the evidence that he's going to
02:03 16 rely on.

02:03 17 It's the patent. He quotes it, that it can be
02:03 18 incorporated into a mobile phone. And then he explains that
02:03 19 Theta's expert, Dr. Larson, didn't even address the [REDACTED]
02:03 20 agreement whatsoever and didn't dispute the technical
02:03 21 comparability.

02:03 22 THE COURT: Okay. Let me try again.

02:03 23 So I have Paragraph 506. Your expert states that the '[REDACTED]
02:03 24 patent is technically comparable -- let me just say that -- try
02:03 25 it this way.

02:03 1 Your witness is on the stand and you put him on in direct.
02:03 2 And on the stand, he says that the '█████ patent that was the
02:04 3 subject of one of the licenses you all want to use is
02:04 4 technically comparable to the asserted patents in that, one,
02:04 5 the patent directly reads on power concentration within a
02:04 6 specific component of an electrical system such as might be
02:04 7 incorporated into a mobile phone, as referred within the patent
02:04 8 specification.

02:04 9 And counsel for plaintiff gets up and says, what is your
02:04 10 basis for making that conclusory statement?

02:04 11 Where in your -- in his report does he give the basis for
02:04 12 making that statement, if anywhere?

02:04 13 MR. TISHMAN: The basis is 506. It's the patent. And
02:04 14 they had a chance to ask him about this in his deposition --

02:04 15 THE COURT: No, no, no. I'm sorry. I didn't mean to
02:04 16 interrupt.

02:04 17 That where -- they have a chance to ask about it, and
02:04 18 deposition doesn't go very far with me. So what I care about
02:04 19 here is where beyond -- let me try it like this since I'm not
02:05 20 getting very far.

02:05 21 Where, besides in Paragraph 506, does this expert provide
02:05 22 an opinion with respect to why the '█████ patent in the CRG
02:05 23 agreement was comparable?

02:05 24 Does he do it anywhere besides 506?

02:05 25 MR. TISHMAN: It's 506, Your Honor. And part of that

02:05 1 is -- and if I can turn to Haystack. Haystack, Dr. Larson, who
02:05 2 put in an opening report, explained why he didn't think
02:05 3 Haystack was comparable. And Dr. Kiaei responded to each of
02:05 4 his points.

02:05 5 But on [REDACTED], which was not addressed in Dr. Larson's
02:05 6 report, he explained that it's comparable. He pointed to the
02:05 7 patent and he explained that Dr. Larson doesn't seem to
02:05 8 disagree with him.

02:05 9 On Haystack he does walk through and explains that it
02:05 10 relates to power consumption and circuit components operating
02:05 11 in parallel such as could be implemented in smartphones. And
02:06 12 then he walks through and does that. I've highlighted a few
02:06 13 sentences here, but he does that for each of the patents. And
02:06 14 he explains how each of those patents address the comparable
02:06 15 field, invention and application.

02:06 16 Now, one of the things that we heard about when my
02:06 17 colleague on the other side was arguing, was there's no
02:06 18 standard provided. Dr. Kiaei is a technical expert, he's not
02:06 19 required to recite legal standards or memorize legal standards.

02:06 20 He explained how the patents and the comparable licenses
02:06 21 are from a comparable field of technology related to similar
02:06 22 inventions. And this is what I've put here on the screen, is
02:06 23 Paragraph 35 of their expert, Dr. Larson's, legal standard.
02:06 24 Just to illustrate, Your Honor, that it's -- this is all he
02:06 25 says. So this is what they're saying that Dr. Kiaei should

02:06 1 have included in his report. He offered a rebuttal report and
02:07 2 he offers in his opinions the same sorts of things, comparable
02:07 3 field, similar inventions.

02:07 4 On to economic comparability. Again, the law requires an
02:07 5 expert to account for differences and identify things to allow
02:07 6 the jury to discount as needed. And the degree of
02:07 7 comparability, again, is left to the jury.

02:07 8 Dr. Ugone analyzed the agreements. He explained that
02:07 9 they -- what the structure was, the dates, the amounts, the
02:07 10 parties, a number of other factors. And ultimately he
02:07 11 identified just one adjustment that he felt was needed. He
02:07 12 adjusted for the difference in the time between the
02:07 13 hypothetical negotiation and the comparable licenses. He made
02:07 14 a 5X multiplier to account for that. As to the other
02:07 15 differences, he identified the facts and he made an adjustment
02:08 16 with respect to timing.

02:08 17 And with that, Your Honor, unless you have any further
02:08 18 questions, I'll pass the podium.

02:08 19 THE COURT: I don't.

02:08 20 MR. TISHMAN: Okay. Thank you, Your Honor.

02:08 21 THE COURT: Thank you, sir.

02:08 22 Yes, sir.

02:08 23 MR. FLYNN-O'BRIEN: I think one thing that both parties'
02:08 24 presentation make clear is that there's no dispute as to the
02:08 25 relevant paragraphs in Dr. Kiaei's expert report for the CRG

02:08 1 patent. It's Paragraph 506. For the [REDACTED] patents it's 508
02:08 2 and 509. So we're talking about three whole paragraphs. And
02:08 3 in those paragraphs there are no citations, there are no
02:08 4 discussions, there's no pincites to the patents, there's no
02:08 5 citations to any other materials, there's no additional
02:08 6 discussion. There's a single sentence for each patent. Those
02:09 7 are the sorts of vague and conclusory statements that do not
02:09 8 belong before a jury.

02:09 9 As to Dr. Ugone, the only adjustment -- counsel on the
02:09 10 other side referred to an adjustment that Dr. Ugone made. That
02:09 11 adjustment was only related to the timing of the agreements.

02:09 12 Another problem, of course, with this, he thinks Samsung's
02:09 13 position here is that the two agreements they're relying on are
02:09 14 from 2010, nearly eight years before the hypothetical
02:09 15 negotiation. Dr. Ugone purports to make an adjustment to
02:09 16 correspond to that time difference and the fact that people's
02:09 17 usage of cell phones changed quite a bit in those eight years.

02:09 18 But he doesn't make any other adjustments. He doesn't
02:09 19 make any other analysis, assessments or adjustments to reflect
02:09 20 or accommodate the negotiating positions between the parties,
02:09 21 their -- the particular value or utility of the patents at
02:10 22 issue in those agreements versus the utility of the patents at
02:10 23 issue in this case, or any of the other sort of economic
02:10 24 analysis that you would normally expect when you have a
02:10 25 comparable agreement opinion.

02:10 1 With that, I'll turn it back over.

02:10 2 THE COURT: Anything else?

02:10 3 MR. TISHMAN: Nothing further, Your Honor.

02:10 4 (Off-the-record bench conference.)

02:12 5 THE COURT: The Court is going to deny the motion.

02:12 6 The next I have is defendant's motion with respect to --

02:12 7 I'm assuming it's Dr. Bergman, B-e-r-g-m-a-n?

02:13 8 MR. TISHMAN: Hello, again, Your Honor. Mr. Edelin is

02:13 9 going to pull up the slides. Just a moment.

02:13 10 While he's pulling them up, Your Honor, I'll just start by

02:13 11 saying this is an important but fairly straightforward motion.

02:13 12 It really -- there's a number of issues at play, but the big

02:13 13 one is, Mr. Bergman failed to apportion damages for

02:13 14 600,000 units, [REDACTED]

02:13 15 [REDACTED] if you were to

02:13 16 include the now-dropped earliest patent.

02:13 17 Of course, Your Honor knows well that the entire market

02:13 18 value rule says you cannot claim damages on the entire profits

02:14 19 of a product. You cannot claim a percentage of the entire

02:14 20 profits of a product unless you can show that the patented

02:14 21 feature alone drives demand for the product. That's exactly

02:14 22 what Mr. Bergman did with respect to the 600,000 units.

02:14 23 So what we're showing here is Dr. Prince's microeconomic

02:14 24 analysis, and we've got really two aspects of it that

02:14 25 ultimately result in \$4.72 per unit. One is the price effect.

02:14 1 That's the yellow box between the p* and the p** on the left.
02:14 2 We've also shown it on the right, in the bar chart on the right
02:14 3 as well.

02:14 4 The other aspect is the red box. The red box is the
02:14 5 quantity effect. Dr. Prince says: But for the invention and
02:14 6 the 20.9 minutes that it gives, these sales wouldn't have
02:14 7 happened; so therefore, we can take the entire profits for
02:14 8 these sales, that red box.

02:14 9 That's \$253.16 per unit. I'll show in a later slide that
02:15 10 ends up being about [REDACTED] that then gets fed into a
02:15 11 profit-splitting analysis.

02:15 12 But there's no dispute that for these -- what's in red
02:15 13 here, that entire profits for those units is being counted and
02:15 14 fed into this \$4.72 per unit figure.

02:15 15 Now, you're going to hear -- this is in the briefing as
02:15 16 well, and I think it's going to be in the presentation -- these
02:15 17 boxes are going to be drawn a little bit different, but there's
02:15 18 no dispute on the math and the facts that, as to those
02:15 19 600,000 units, they're taking the entire profits.

02:15 20 So what we're asking for, Your Honor, one aspect of our
02:15 21 motion, is to essentially -- for the lack of a better way of
02:15 22 saying it, let's get rid of the red box. Let's kill the red
02:15 23 box here.

02:15 24 So that's the first aspect of our motion. I think you'll
02:15 25 hear a bit from my colleagues on the other side about the

02:16 1 entire market value being a really big revenue number.

02:16 2 LaserDynamics says you can't take a percentage of revenues
02:16 3 or profits, and that's what they've done. They've taken a
02:16 4 percentage of the entire profits for 600,000 units.

02:16 5 You're also going to hear, well, but for the invention,
02:16 6 you wouldn't have these 20.9 minutes and you wouldn't have had
02:16 7 the 600,000 sales. So therefore it's okay to take all these
02:16 8 profits. That's exactly what LaserDynamics was about.

02:16 9 Your Honor, I didn't see anything in the opposition brief
02:16 10 about LaserDynamics. This is really our lead case in our
02:16 11 opening brief. There was no response on it. But it's very
02:16 12 analogous.

02:16 13 In that case the issue was an optical disk drive, and it
02:16 14 wasn't enough -- the Federal Circuit said, it's not enough to
02:16 15 show a laptop computer without an optical disk drive.
02:16 16 Practicing the disk discrimination method would be commercially
02:17 17 unviable. If that were sufficient, a number of other features
02:17 18 could drive demand, including a high-resolution screen. It
02:17 19 lists a number of other features.

02:17 20 That is not enough, Your Honor. And the same can be said
02:17 21 about these 600,000 units. Even without the 20.9 minutes,
02:17 22 there's a number of other features. The ability to make a
02:17 23 phone call, the screen, a number of other features.

02:17 24 Now, they're going to say, we're not really doing entire
02:17 25 market value rule. We're not saying that this feature alone

02:17 1 drives demand. But that's exactly what they're doing, Your
02:17 2 Honor. They're taking a percentage of the entire profits for
02:17 3 600,000 units.

02:17 4 There's some discussion in Theta's briefing about how they
02:17 5 do a 40 to 60 percent split to what they say further apportion
02:17 6 this. Your Honor, they do 40 to 60 percent of the entire
02:17 7 profits for 600,000 units. [REDACTED]

02:18 8 [REDACTED]

02:18 9 There's a second basis, Your Honor. So the first basis
02:18 10 being let's kill that red box. The second basis being this
02:18 11 failure to apportion 600,000 units bleeds into the entire
02:18 12 analysis. The entire damages analysis is based on this change
02:18 13 in profit that includes the profits associated with the red
02:18 14 box. [REDACTED]

02:18 15 [REDACTED] And that's the input that leads to the total
02:18 16 that I've shown in the third row on this table here, \$4.72 per
02:18 17 unit.

02:18 18 So the second basis would be the entire damages analysis
02:18 19 based on the \$4.72 should be excluded.

02:18 20 There's a third aspect of our motion, and this is very --
02:18 21 two very specific points that are somewhat unrelated, but we
02:19 22 included them in the same motion because it's all about
02:19 23 Mr. Bergman. The first one is he's not a technical expert. He
02:19 24 doesn't purport to be a technical expert.

02:19 25 But there's a lengthy discussion in his report where he

02:19 1 explains about battery manufacturing. He says manufactures
02:19 2 have reached the limit of how much power they can squeeze into
02:19 3 batteries. He's not an expert in battery technology. He's not
02:19 4 the right guy to tell the jury about that, Your Honor.

02:19 5 The next sort of similar issue relates to -- you know, we
02:19 6 were talking about just a couple paragraphs, relates to the
02:19 7 form of the license. He says that it should be a running
02:19 8 royalty. And to support that there's two things he relies on
02:19 9 that we say are improper. The first is a national aggregate
02:19 10 study by Varner. National aggregate studies like that are
02:19 11 untethered to the actual record in the case, so they should be
02:19 12 excluded. The Southern District of California did that in the
02:20 13 Carucel v. Novatel case.

02:20 14 The next one I don't really think there's a dispute here.
02:20 15 Mr. Bergman, in his report, as damages experts sometimes do,
02:20 16 refers to a Federal Circuit case to support a proposition. He
02:20 17 shouldn't be allowed to present to the jury anything about
02:20 18 Federal Circuit cases. He's not a legal expert. That's for
02:20 19 Your Honor to do, obviously.

02:20 20 So that's -- it doesn't seem like there's an agreement
02:20 21 here, looking at their opposition. But we submit that 355 and
02:20 22 356 from the report should be out, the reliance on Varner and
02:20 23 the Federal Circuit case.

02:20 24 So just to summarize, the bases of the report, this fourth
02:20 25 aspect, you can set that aside. You've already denied the

02:20 1 motions on Dr. Larson and Dr. Prince.

02:20 2 So the bases are: We should eliminate the quantity
02:20 3 effect, the red box; the whole \$4.72 has, as an input the red
02:20 4 box. So it should be eliminated as well. That's Basis 2.

02:21 5 And the third and fourth have to do with these specific
02:21 6 paragraphs that are listed in our briefing.

02:21 7 Thank you, Your Honor.

02:21 8 THE COURT: Anything else?

02:21 9 MR. TISHMAN: That's it for me, Your Honor. Unless you
02:21 10 have any questions. Thank you.

02:21 11 THE COURT: Yes, ma'am.

02:21 12 MS. DE MORY: Good afternoon, Your Honor.

02:21 13 So this will be pretty quick. [REDACTED]

02:21 14 [REDACTED]

02:21 15 [REDACTED] The analysis that was done in this
02:21 16 case does not violate the entire market value rule in any way.
02:22 17 Samsung is just mischaracterizing it or misunderstanding it.

02:22 18 So let's go ahead and -- and Samsung -- and Theta's -- I'm
02:22 19 sorry. Theta's damages analysis doesn't even rely on these
02:22 20 numbers.

02:22 21 So let's go ahead and go to the next slide.

02:22 22 So this is it. I showed you the textbook earlier. This
02:22 23 is the picture that was in the textbook. And so Dr. Prince
02:22 24 conducted a survey, and he determined what the profit would be
02:22 25 for Samsung with the 20.9 minutes and without the 20.9 minutes

02:22 1 using this model that is depicted here on the screen.

02:22 2 So go ahead and click.

02:22 3 So the first box is Samsung's profit without the benefit
02:22 4 of the inventions, and the second box he calculated is
02:22 5 Samsung's profits with the inventions. And then he did a
02:23 6 little math, and he subtracted the area between those two
02:23 7 profit numbers. It is absolutely 100 percent apportioned to
02:23 8 the exact -- exactly tied to the 20.9 minutes that Dr. Larson
02:23 9 calculated.

02:23 10 So there's one area which is how much money would Samsung
02:23 11 make with the 20.9 and one area which is how much would Samsung
02:23 12 make without the 20.9, and it really is -- all Samsung is
02:23 13 challenging --

02:23 14 If you could just click one more, Aaron.

02:23 15 -- is this --

02:23 16 One more.

02:23 17 -- whether or not the math, the difference between these
02:23 18 two boxes, Samsung's total profits with 20.9 and Samsung's
02:23 19 total profits without 20.9, include the yellow box alone or the
02:23 20 yellow- and red-shaded box. That's it.

02:24 21 It's not a violation of the entire market value rule. It
02:24 22 is that the area underneath that curve has two components,
02:24 23 price and quantity. [REDACTED]

02:24 24 [REDACTED]

02:24 25 [REDACTED]

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[REDACTED]

As to the other two issues, the battery stuff, Mr. Bergman did exactly what he was supposed to do. He is opining as a damages expert on battery savings. He went through and he studied all the literature that is in -- out there, and he's going to testify about some background facts about battery savings and what's happening in the market. That's what he's supposed to do.

And as to the final issue, I don't think he's going to be -- he probably will put up Georgia-Pacific on a slide. I don't think he's necessarily going to be opining about the cases. But the principles in those cases apply perfectly to his analysis, and he's going to describe why they apply and, you know, what the relative bargaining power of these parties should be.

And so those are, I think, in limine motions; but nonetheless, they should still be denied in the context of this Daubert.

MR. TISHMAN: If we can just keep this slide, Your Honor.

Just one point. With respect to this, I guess, orange or red box, I didn't hear a dispute that, as to that box, they're taking a percent of the entire profits for those 600,000 units. That violates the entire market value rule, and there's no law that says you can violate the entire market value rule for just some of the units and not the others.

02:25 1 With that, Your Honor, unless you have any questions.

02:25 2 THE COURT: A response to that?

02:25 3 MS. DE MORY: It's not the entire market value. It is the
02:25 4 area under the curve, which is the difference -- it's just
02:25 5 calculating the difference under a curve essentially, which is
02:25 6 what's the total profit with the 20 minutes and what's the
02:26 7 total profit without the 20 minutes. And that's what's here.
02:26 8 And the two -- the axes happen to be quantity and price because
02:26 9 that's how you calculate profit.

02:26 10 THE COURT: Are you asking for the entire amount of the
02:26 11 profits that the 27 (sic) minutes allegedly gives you -- are
02:26 12 you asking for the entire profit increase that you allege
02:26 13 Samsung enjoys from the 27 (sic) minutes?

02:26 14 MS. DE MORY: It's apportioned so it is exactly the amount
02:26 15 that is tied to the 20 minutes, the profit that is tied to the
02:26 16 20 minutes.

02:26 17 THE COURT: Is it all --

02:26 18 MS. DE MORY: No. It's the difference in profits between
02:26 19 if they had the 20 minutes and if they didn't have the
02:26 20 20 minutes.

02:26 21 THE COURT: And are you asking for all of the profits?

02:26 22 MS. DE MORY: No. And then that is further apportioned by
02:26 23 Dr. Bergman otherwise in his report. He actually apportions it
02:26 24 further, which is he said they would have agreed to a 40/60
02:26 25 split after that. So it is not -- we're not even at -- even

02:26 1 that is not accurate. So...

02:26 2 THE COURT: Okay. Anything else, counsel?

02:26 3 MR. TISHMAN: Your Honor, I think the issue is they're
02:27 4 asking for a percentage of the entire profits.

02:27 5 THE COURT: That's a step. But then they go on to
02:27 6 apportion.

02:27 7 MR. TISHMAN: That's the percentage. That's the 40 to 60,
02:27 8 is the percentage of the entire profits of this orange box.

02:27 9 THE COURT: Well, it's a portion -- it's -- they want X
02:27 10 percent -- or they say the parties would have agreed to X
02:27 11 percent of the increase in profits you made off of all of the
02:27 12 sales of the products as a result of the minutes, if I
02:27 13 understand the damages theory correctly.

02:27 14 MS. DE MORY: Yes.

02:27 15 THE COURT: So they have apportioned the value of the
02:27 16 patent in the format of the 27 minutes and used a formula to
02:27 17 then say this is the amount of money that Samsung obtained as a
02:27 18 direct result of the patented feature on all their phones. And
02:28 19 that they wouldn't have gotten -- but for this patent, they
02:28 20 wouldn't have had that increase. And then we divide up. I'm
02:28 21 not sure what your problem with that is.

02:28 22 MR. TISHMAN: So --

02:28 23 THE COURT: You may disagree, for example, with the
02:28 24 methodology of the way he did it or whatever that is. But here
02:28 25 he is -- he has taken the feature and said -- because the

02:28 1 profit -- unlike, for example, you know, the Russian nesting
02:28 2 doll and all that stuff and where, you know, the -- as
02:28 3 Mr. Cordell and team knows, I was actually modestly involved
02:28 4 with some of the cases in the -- in San Diego that this came
02:28 5 from. So I'm probably more familiar with this or think I am
02:28 6 more familiar with this.

02:28 7 But the apportionment here is not like in the famous case,
02:28 8 the date picker where you were saying you have Outlook and
02:28 9 Outlook is worth X dollars. And that what is the date feature
02:29 10 worth -- date-picking feature worth? And then how do we divide
02:29 11 up what that -- how much did the patent contribute to the
02:29 12 date-picking feature? Let's say it's 100 percent. So now how
02:29 13 much is the date feature worth to Outlook? And then how do we
02:29 14 divide up the amount of money we made off that?

02:29 15 Here, as I understand their theory, it is the sales that
02:29 16 Samsung made X number more dollars as a result of the
02:29 17 improvement that the patent provided for -- of the entire
02:29 18 number of sales. I'm not sure where the apportionment comes
02:29 19 in.

02:29 20 MR. TISHMAN: The issue is that the bottom line here is
02:29 21 costs, the top line is price. And for these orange ones,
02:29 22 that's 600,000 units, they are taking 100 percent of that as
02:29 23 the input into a later 40 to 60 percent split.

02:29 24 THE COURT: Well, your client got 100 percent of the money
02:29 25 they made from the sale of those 600,000 units. And what

02:29 1 they're saying is the way they've done it is that their patent
02:30 2 allowed for a delta of more dollars, which is that box, and
02:30 3 they want to split that.

02:30 4 If I understand this -- and maybe I'm misunderstanding,
02:30 5 but that's what I think I'm hearing.

02:30 6 MR. CORDELL: This is what you don't want your partners to
02:30 7 stand up and do, is to get up and argue with you. But, Your
02:30 8 Honor, I think the disconnect here is that, for the orange box,
02:30 9 they're asking for all of Outlook.

02:30 10 THE COURT: But I think what they're saying is, unlike the
02:30 11 date picker, which has only added X value, that Microsoft was
02:30 12 able to sell -- Microsoft would have been able to sell -- I'll
02:30 13 make up a number -- \$100 million worth of Outlook. Because of
02:30 14 the date-picker feature itself, they were able to sell
02:30 15 \$120 million worth, and what they want to divide up is the
02:30 16 extra \$20 million the patented feature provided to Microsoft
02:31 17 because it increased their sales by that number of dollars.

02:31 18 MR. CORDELL: Correct. That's exactly what they're doing.

02:31 19 THE COURT: And I'm not -- and I'm not sure why that's not
02:31 20 okay.

02:31 21 MR. TISHMAN: So it's exactly what LaserDynamics says.
02:31 22 For Quanta here, those guys wouldn't have sold any of their
02:31 23 laptops if it weren't for the ODD with the disk discrimination
02:31 24 method because it wouldn't be considered commercially viable.
02:31 25 And the Federal Circuit said that's not enough. Any feature

02:31 1 you could say that about. You have to show that that alone
02:31 2 drives demand.

02:31 3 THE COURT: Well, and I don't know that their expert is
02:31 4 going to be able to do that, but that's not what we're arguing
02:31 5 here. I mean, their argument is that that is what he's going
02:31 6 to say.

02:31 7 MR. TISHMAN: He does not say that 20.9 minutes alone
02:31 8 drives demand. He admitted in deposition -- this is in the
02:31 9 briefing -- that he does not allege that the entire market
02:31 10 value comes from 20.9 minutes.

02:31 11 THE COURT: No. I think he says the increase in
02:31 12 the profit -- not profits, the increase in the amount of
02:32 13 dollars Samsung got was the -- was -- there was X without it,
02:32 14 there's X plus Y with it, and they want to share Y, is the way
02:32 15 I see it in the simple terms.

02:32 16 And if that's correct, then I'm -- if my understanding of
02:32 17 what they're arguing is correct, then I'm going to deny your
02:32 18 Daubert motion.

02:32 19 MR. TISHMAN: I believe that your understanding is correct
02:32 20 with the caveat that, for the red box there, it's 100 percent
02:32 21 of them -- 100 percent of those profits are what's fed into a
02:32 22 40/60 profit split.

02:32 23 THE COURT: 100 percent of the profits, the additional
02:32 24 profits. If I'm wrong on that, I need to know. But it's
02:32 25 100 percent of the additional profits that they are going to

02:32 1 credit to the patented feature.

02:32 2 MR. TISHMAN: All of the profits -- that's what
02:32 3 LaserDynamics was. All of the profits were additional profits.
02:32 4 They wouldn't have sold any but for the invention, so that's
02:32 5 not enough.

02:32 6 THE COURT: Yeah, but this is a different fact scenario
02:32 7 than that. Here -- and we got to wind this up because I've got
02:32 8 a Markman in a half hour. But here, they are asking for a
02:33 9 percentage of the additional profit their person says.

02:33 10 Now, if you want, you can cross-examine on his
02:33 11 methodology, how did he prove that the patent was responsible
02:33 12 for that X percent increase, and so your number is nuts.
02:33 13 You'll get to do that at cross.

02:33 14 But for Daubert purposes, I'm going to deny your motion
02:33 15 with regard to the methodology. I understand the method and I
02:33 16 don't think it's impermissible.

02:33 17 MR. TISHMAN: Okay. Thank you, Your Honor.

02:33 18 THE COURT: So next up I have -- because you haven't
02:33 19 beaten up on Mr. Bergman enough, I have Daubert -- a Daubert on
02:33 20 Smith and Bergman.

02:33 21 MR. TISHMAN: That's me as well, Your Honor. And I think
02:33 22 I can be quick. While he's flipping to the slides, I'll just
02:33 23 get started.

02:33 24 Our papers are pretty extensive on this, but it's not
02:33 25 really a damages issue. That's why we split it up this way.

02:33 1 This has to do with both Dr. Smith and Mr. Bergman have a lot
02:33 2 of discussion in their reports about citations to non-asserted
02:34 3 patents.

02:34 4 And there's really two issues with that. One is relevance
02:34 5 and one is reliability. I'll try to do both of them quickly.

02:34 6 On relevance, I'll just show you what they do. Smith
02:34 7 gives a table from Google patents. He identifies a bunch of
02:34 8 citations to patents in the Tsividis patent family. He says
02:34 9 there's at least 26 citations to them.

02:34 10 Sorry. I'm not publishing again.

02:34 11 Bergman says something similar, but he says the '962
02:34 12 patent actually was cited 26 times. So I think there's a
02:34 13 disconnect there, and we'll get to that in a bit, Your Honor.

02:34 14 But on the relevance issue, they give three main relevance
02:34 15 arguments. One is validity. The other is knowledge of the
02:34 16 patents. The third is bargaining position at the hypothetical
02:34 17 negotiation.

02:34 18 On validity, really the thesis of Dr. Smith is it shows
02:35 19 that other people held these patents as important. But when
02:35 20 you're talking about secondary considerations and
02:35 21 nonobviousness, holding non-related -- or related but
02:35 22 non-asserted patents important is not the same as the actual
02:35 23 asserted patents. So there's some relevance issues and
02:35 24 likelihood of confusion here.

02:35 25 On knowledge of the patents it's really the same issue.

02:35 1 We're looking at a table here. Most of these citations are
02:35 2 before the asserted patents even issued. So --

02:35 3 THE COURT: Let me jump ahead here for just a second. I
02:35 4 don't really see this. I could be wrong. You got a lot of
02:35 5 lawyers in the room who are smarter than I am. But I don't
02:35 6 really see this, although I don't know why the other patents
02:35 7 would come in.

02:35 8 I don't see this as a Daubert as much as I do just a flat
02:35 9 issue of relevance. So that if -- and maybe I don't have the
02:35 10 connect between they said this, which is irrelevant, to get to
02:36 11 their opinion, and that's the point.

02:36 12 But it seems to me that if the expert, Smith or Bergman,
02:36 13 want to talk about, you know, validity and they go into
02:36 14 something like those other patents that you think are
02:36 15 irrelevant, Mr. Cordell or Mr. Black, who are not shy people,
02:36 16 will be -- can easily stand up and say, objection, Your Honor.
02:36 17 And then they can take him on voir dire or they can explain to
02:36 18 me why they're irrelevant or do it that way.

02:36 19 But I feel like I would understand that objection a lot
02:36 20 better in the context of when I'm listening to the testimony
02:36 21 than I am just arbitrarily whacking things in the form of a
02:36 22 Daubert.

02:36 23 So I'm going to deny your Daubert without any prejudice to
02:36 24 you all being able to make objection -- whatever is in here it
02:37 25 can be made as an objection during trial.

02:37 1 And, now, I think we're going to, at some point, get to
02:37 2 the motions in limine if we have time here. I will let you all
02:37 3 know that when one of you -- I'll pick on Mr. Cordell again --
02:37 4 stand up and says, Your Honor, that question violates Motion in
02:37 5 Limine 713, I really don't know what any of the motions in
02:37 6 limine were by number.

02:37 7 If something violates a motion in limine so severely that
02:37 8 you need to object, you just need to say may we approach or
02:37 9 something like that, and I can take it up, if you want me to
02:37 10 take it up outside of the presence of the jury. But I will --
02:37 11 I'm telling you in advance I will not know what Motion in
02:37 12 Limine 16 was or why the question violates it.

02:37 13 And so I'm denying the motion -- the Daubert motion
02:37 14 without prejudice.

02:37 15 Now, let me see what we have next.

02:37 16 MR. TISHMAN: And, Your Honor, there is a reliability
02:37 17 aspect to this. I know it's separate from the relevance. If
02:38 18 you're -- we have your ruling. I just want to make sure you're
02:38 19 aware there's a reliability aspect to this as well.

02:38 20 THE COURT: To the extent they're unreliable, I think it's
02:38 21 because it's not relevant. And from what you've shown me so
02:38 22 far, I don't know why some of that stuff is relevant, but I
02:38 23 don't know why it's relevant. And another lawyer's going to
02:38 24 get up and say it is relevant, and I won't really know any
02:38 25 better than why -- I won't know who to believe.

02:38 1 But I promise you, I actually most of the time do pay
02:38 2 attention during trial. And so if you're asking questions
02:38 3 and -- if they ask a question and you object because it's
02:38 4 irrelevant or something, I promise you, I will rule on it then.

02:38 5 MR. TISHMAN: Okay. Thank you, Your Honor.

02:38 6 THE COURT: So let me -- give me one second.

02:38 7 Let's do this. Let me ask anyone from the defendant who's
02:39 8 going to handle this, I have -- oh, I have -- I'm sorry, for
02:39 9 the plaintiff, there's something about failure to produce
02:39 10 documents with regard to Hutchinson and Bedford. I'm not sure
02:39 11 what that is.

02:39 12 Yes, ma'am?

02:39 13 MS. DE MORY: Yes. So this was the issue that I had stood
02:39 14 up prematurely and said a lot of the issues in those written
02:39 15 objections overlap with some things that are even handled in
02:39 16 better context in the context of our MILs. And so we were
02:39 17 going to defer consideration of those issues in the context
02:39 18 of -- until in the context of the MILs. And there may be one
02:40 19 still to take up, which is the Bedford issue.

02:40 20 THE COURT: Okay. Let's do that. And give me just one --
02:40 21 you can come up.

02:40 22 (Off-the-record bench conference.)

02:40 23 THE COURT: Yes, sir?

02:41 24 MR. BUNSOW: Your Honor, I'd like to address
02:41 25 Mr. Hutchinson, who is a late disclosed, undiscovered witness

02:41 1 from Qualcomm.

02:41 2 And the last time this came up, we said we wanted to take
02:41 3 his deposition if he was going to testify. Mr. Black promised
02:41 4 you, no problem. If he's going to testify, we'll make him
02:41 5 available for deposition.

02:41 6 Since then we've been asking almost every day if we can
02:41 7 have his deposition. I'd like to know at this late stage: Is
02:41 8 he going to testify or not; and if he is, when can we take his
02:41 9 deposition?

02:41 10 Now, the subject matter of his testimony is a whole
02:41 11 'nother issue, but at the very least, if they think they're
02:41 12 going to put him up, we need to take his deposition.

02:41 13 THE COURT: I got it.

02:41 14 MR. CORDELL: So what Mr. Bunsow said was almost right.
02:41 15 Mr. Black did say that it would be no problem back in August,
02:41 16 and we heard nothing for months and months and months. We
02:42 17 exchanged witness lists a few weeks ago. Mr. Hutchinson was on
02:42 18 our list and now they've -- they want to take his deposition.

02:42 19 We've been working with his lawyers. He's a Qualcomm
02:42 20 employee. We are working through them, and they've said he's
02:42 21 available. So there should be no problem to take his
02:42 22 deposition in the next few days.

02:42 23 THE COURT: Okay. There you go. Easy-peasy.

02:42 24 And I was checking with Jeff, to the extent whatever we
02:42 25 don't get finished today, we'll take up Thursday afternoon by

02:42 1 Zoom, so...

02:42 2 MR. CORDELL: And I can dispose of Mr. Bedford as well,
02:42 3 easily, I think. We had this discussion on December 16 and we
02:42 4 offered to put him up for deposition, and I thought the
02:42 5 plaintiff had accepted that. So I think it should be pretty
02:42 6 straightforward.

02:42 7 MS. DE MORY: Your Honor, we are willing -- what happened
02:42 8 on our last hearing was that Mr. Cordell said that they were
02:42 9 going to replace their corporate rep, and you said things
02:42 10 happen, and that's fine. And you also said what's he really
02:42 11 going to say? Hi, I work for Samsung, this is Samsung.

02:42 12 The problem is, they have a proffer which is that he's not
02:43 13 just going to say I work for Samsung. And we didn't take this
02:43 14 up at the last hearing because we had it in our objections.

02:43 15 So the issue is he's going to do three things. He's going
02:43 16 to introduce Samsung, fine. We'll take his deposition on that,
02:43 17 we'll hear what he has to say.

02:43 18 The second thing he's going to do is he is going to
02:43 19 replace Mr. Hawke who was going to be their designee, and he
02:43 20 was a 30(b)(6) witness. So he's going to testify -- and they
02:43 21 claim that Mr. Hawke is unavailable. So he's going to testify
02:43 22 for Mr. Hawke. And they say he's going to testify consistently
02:43 23 with him. He's at least a marketing person, which Mr. Bedford
02:43 24 is a marketing person, so that -- you know, it doesn't seem
02:43 25 that offensive. And he says he's unavailable.

02:43 1 The third person, though, they say he's going to testify
02:43 2 for Mr. Lim. Now, you heard about some of Mr. Lim's testimony
02:43 3 earlier. Mr. Lim is a witness, a lawyer who was offered as a
02:44 4 30(b)(6) witness on issues of Samsung's knowledge of the
02:44 5 patents. All he did was read the interrogatory responses and
02:44 6 answer those interrogatory -- consistent with those
02:44 7 interrogatory responses which we don't believe are admissible.
02:44 8 It will be no more admissible if Mr. Bedford comes and now says
02:44 9 what Mr. Lim said about the interrogatory responses that are
02:44 10 not admissible.

02:44 11 And we were otherwise precluded from asking any questions
02:44 12 about who learned of the applications, what did they do after
02:44 13 they learned about them, what did they -- otherwise.

02:44 14 And so what we're getting now is -- and we have no
02:44 15 evidence that Mr. Lim is unavailable. They have never said
02:44 16 he's not available.

02:44 17 So what they're trying to do with Mr. Bedford is bring in
02:44 18 somebody to replace basically 30(b)(6) testimony that they
02:44 19 don't like. We think it's improper. We think it's
02:44 20 prejudicial. The Lim testimony should be played to the extent
02:44 21 it's admissible. And otherwise they should not be able to fix
02:44 22 that through a new corporate rep when the other witness is not
02:44 23 unavailable.

02:45 24 MR. CORDELL: 30(b)(6) testimony, as I understand the
02:45 25 rules, is usable by them for whatever purpose they choose.

02:45 1 THE COURT: It is.

02:45 2 MR. CORDELL: I don't know exactly why that's --

02:45 3 THE COURT: Yeah. I'm not really following -- they're not
02:45 4 going to present him at trial as a 30(b)(6) witness.

02:45 5 MR. CORDELL: Right.

02:45 6 THE COURT: He's just going to be him.

02:45 7 MS. DE MORY: Well, he's going to testify to the things
02:45 8 that Mr. Lim testified to.

02:45 9 THE COURT: No. He's not going to testify -- if he
02:45 10 testifies, you can -- if he says something that is consistent
02:45 11 with what the 30(b)(6) witness said, you're fine. If he says
02:45 12 something contrary to what the 30(b)(6) witness said, you can
02:45 13 impeach him with the 30(b)(6) deposition.

02:45 14 MS. DE MORY: We don't even believe the 30(b)(6) stuff is
02:45 15 admissible as it is.

02:45 16 THE COURT: You don't what?

02:45 17 MS. DE MORY: We do not -- it is our position that that
02:45 18 testimony is not admissible in the first place. He had no
02:45 19 firsthand knowledge. He just read the interrogatory
02:45 20 response --

02:45 21 THE COURT: Well, the 30(b)(6) deposition isn't firsthand
02:45 22 knowledge. It's corporate knowledge.

02:45 23 And so -- and I would -- I might even go so far as to say
02:45 24 that if this gentleman gets on as a corporate representative,
02:45 25 which he would be -- he's not 30(b)(6), but he would be a

02:46 1 corporate representative.

02:46 2 And if he says -- I'm making this up -- Samsung not only
02:46 3 knew about all these three patents, we infringed them on
02:46 4 purpose and we had a party the week after we found out about
02:46 5 them, if that was -- if the corporate representative had said
02:46 6 the opposite and you showed me that, there's a good chance I
02:46 7 would strike that and tell the jury they have to disregard it
02:46 8 because the corporation has already taken a different position
02:46 9 and what a 30(b)(6) is.

02:46 10 So the way I see it is, this gentleman is going to be a
02:46 11 live person, a human, saying whatever that Samsung wants him to
02:46 12 say about Samsung and whatever they did. But -- and you get to
02:46 13 depose him tomorrow or Thursday or Friday, whenever, about all
02:46 14 that.

02:46 15 But if he says something that's incongruent in any way
02:46 16 from what the corporate deposition said, you have that
02:47 17 deposition and you can either impeach him with it or I'll
02:47 18 strike it because that's why we take 30(b)(6)s.

02:47 19 This guy's not going to be a 30(b)(6).

02:47 20 MS. DE MORY: I understand that. And this is why I wanted
02:47 21 to do it in the context of the motions in limine because that
02:47 22 30(b)(6) deposition is the one that Mr. Bunsow already raised,
02:47 23 that you have cautioned them about twice in other proceedings,
02:47 24 which is they basically instructed him not to answer every
02:47 25 question except for what he read from those interrogatories

02:47 1 responses.

02:47 2 THE COURT: Well, if Mr. Cordell asks Mr. X, whatever,
02:47 3 whoever he puts on a question that you had asked the corporate
02:47 4 witness and they instructed that corporate witness not to
02:47 5 answer it, he's not going to be allowed to answer it either.

02:47 6 If a corporate witness refused to answer a question
02:47 7 that -- now, let me say, if the objection was that's outside
02:47 8 the scope of the 30(b)(6), he's not the right person, blah,
02:47 9 blah, that's a fuss we'd have to have.

02:47 10 But if you asked them -- I'm making it up again -- if you
02:47 11 asked the corporate representative: On what date did you know
02:48 12 X?

02:48 13 And they said: Don't answer that question.

02:48 14 I don't know why they would, but you're telling me they
02:48 15 did. If they say -- then Mr. Cordell doesn't get to put on
02:48 16 someone from Samsung to say something that would contradict.
02:48 17 They are in concrete with respect to the 30(b)(6). Whatever
02:48 18 positions they took as lawyers and Samsung at the 30(b)(6) is
02:48 19 what the jury's going to hear.

02:48 20 Anything else?

02:48 21 MR. CORDELL: Good from our perspective, Your Honor.
02:48 22 Thank you.

02:48 23 THE COURT: Okay.

02:48 24 MR. CORDELL: There is one other minor housekeeping
02:48 25 matter. We had submitted a pretrial order a couple weeks back

02:48 1 and in it we had the order of proof, being the way we are very
02:48 2 accustomed to doing it, where the plaintiff puts on the case.
02:48 3 We then respond and put on our affirmative case. And then they
02:48 4 rebut our affirmative case.

02:48 5 It now seems that the plaintiff wants to have a rebuttal
02:49 6 that includes their affirmative burdens. So they want to put
02:49 7 on an infringement case, hear our response. And then in
02:49 8 rebuttal they want to go back to their infringement case.

02:49 9 THE COURT: Their rebuttal would be a rebuttal.

02:49 10 MR. CORDELL: Okay.

02:49 11 THE COURT: A rebuttal is a rebuttal. Now, I allow
02:49 12 rebuttal on everything. In other words, if you -- when you put
02:49 13 your damages guy on, they can put a damages -- their damages
02:49 14 expert back on to rebut what it was he said. Or she said,
02:49 15 whichever.

02:49 16 But the rebuttal phase for the plaintiff will be rebuttal
02:49 17 of what you all raised in your case-in-chief.

02:49 18 MR. CORDELL: So you're going to allow them to rebut on
02:49 19 their affirmative burdens.

02:49 20 THE COURT: I'm going to allow them to rebut what you all
02:49 21 said during their rebuttal, yes.

02:49 22 MR. CORDELL: Do we then get a rebuttal case?

02:49 23 THE COURT: You do not.

02:49 24 MR. CORDELL: Well, what about our validity?

02:49 25 THE COURT: I understand. But I've -- it has to quit

02:49 1 somewhere. And I'm going to allow them to rebut on those
02:50 2 issues and then we'll be done.

02:50 3 MR. CORDELL: Okay.

02:50 4 THE COURT: Except I checked with -- maybe we're all
02:50 5 wrong. I checked with many judges who try a lot of these
02:50 6 cases, and to a person they all said that's the way they do it.
02:50 7 And so I have adopted the procedure of every judge that I know
02:50 8 who's doing it.

02:50 9 MR. CORDELL: Well, not to put too fine a point on it,
02:50 10 Your Honor, but I believe if you're going to allow a rebuttal
02:50 11 on affirmative burdens, that has to apply to both sides.

02:50 12 THE COURT: I know that's your position.

02:50 13 MR. CORDELL: Understood.

02:50 14 MR. BUNSOW: I'll just say that I don't know how many
02:50 15 cases I've tried, but a few. And it's always as you described.

02:50 16 THE COURT: Counsel, you've won.

02:50 17 (Laughter.)

02:50 18 THE COURT: So, Mr. Cordell, I don't mean to be glib. I
02:50 19 understand your point. I've thought it through and that's just
02:50 20 the way I do it.

02:50 21 MR. CORDELL: Understood.

02:50 22 THE COURT: And maybe someday -- the Circuit has certainly
02:50 23 not been reluctant in other areas to tell me when they don't
02:51 24 think I'm doing it correctly. And so this might be another
02:51 25 opportunity. But maybe they might -- who knows? Lightning may

02:51 1 strike and they might say it's okay. So there's that
02:51 2 possibility too.

02:51 3 So what we're going to do is, we'll take up the motions in
02:51 4 limine on Thursday afternoon. And I'll go through them again
02:51 5 before now and then. And let me think if there's anything.

02:51 6 Let me just finish with this on the motions in limine so
02:51 7 you know and I don't forget to tell you. Most things I see in
02:51 8 motions in limine, I see as only a motion in limine. Meaning
02:51 9 if I say something can't come in, it means until one of you
02:51 10 says we -- Judge, we need to approach. We need to raise this
02:51 11 because we intend now to offer this evidence and here's why.

02:51 12 So if I grant the motion in limine, I will tell you if
02:52 13 it's -- I'm granting it, meaning it's not coming in ever. Like
02:52 14 if this were a car accident case, you know, proof of the fact
02:52 15 someone was insured is not coming in. Yes. It's a motion in
02:52 16 limine, but it it's not coming in.

02:52 17 But in this case when I'm granting the motions in limine,
02:52 18 keep in mind that if I -- my opinion of motion in limine is I'm
02:52 19 going to -- if they're things I think that I can't fix in front
02:52 20 of the jury by just ruling on them, I will grant the motion in
02:52 21 limine.

02:52 22 But you all will be free to ask me to allow the
02:52 23 information in. And at that point you can say the reason it
02:52 24 comes in now is someone testified or here's the relevance or
02:52 25 whatever, and I'll be much better able to understand why

02:52 1 something may or may not be admissible at that point.

02:52 2 So the fact that you win a motion in limine doesn't
02:52 3 necessarily mean it's not ever going to come in. It just means
02:52 4 you'll have to approach the bench first.

02:53 5 Is there anything else we need to take up?

02:53 6 MS. DE MORY: No, Your Honor.

02:53 7 MR. CORDELL: Not at this time.

02:53 8 THE COURT: Well, this was one of those days where I won't
02:53 9 even get paid. It was a great pleasure. We'll talk on
02:53 10 Thursday.

02:53 11 THE BAILIFF: All rise.

02:53 12 (Hearing adjourned at 2:53 p.m.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4 I, Kristie M. Davis, Official Court Reporter for the
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